# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1954

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# No. 105

FRANCIS G. A. O'NEILL, PETITIONER,

*vs.*

THE BALTIMORE AND OHIO RAILROAD COMPANY

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. 1]

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION**

Civil No. 2805

FRANCIS G. A. O'NEILL, Plaintiff,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation, Defendant

AMENDED COMPLAINT—Filed September 20, 1951

1. For his cause of action herein plaintiff says that defendant is a railroad corporation duly organized and existing under the laws of the state of Maryland, and is engaged in the railroad business in Licking county, Ohio; that at all times herein defendant corporation was a common carrier by railroad and both plaintiff and defendant were engaged in interstate commerce between the several states of the United States, and this action is brought under and by right of the laws passed by the Congress of the United States.

2. On and about June 22, 1948, defendant corporation maintained and operated a roundhouse and locomotive maintenance and repair shop at Newark, Ohio, wherein defendant corporation serviced, maintained and repaired its steam locomotives.

3. In the course of said operations on said date defendant corporation employed plaintiff as a boilermaker, and [fol. 2] plaintiff was then and there engaged in his said employment and was working on the installation of an ash pan on one of the defendant's steam locomotives. In the course of putting said ash pan in place another employee of defendant, one Roy Jaynes, operated and controlled a chain hoist which was connected to said ash pan and by which hoist the said ash pan was raised and held against the bottom of the locomotive in position to be attached by this plaintiff; that during the raising and holding operation the said hoist was under the exclusive control of the said

Jaynes, and plaintiff was required to, and did, lie on his back and underneath the said ash pan as it remained suspended from the hoist above him. Plaintiff further says that at all times herein the said Jaynes also controlled and manipulated the ash pan by means of steel bar which the said Jaynes used to pry the sides of the said ash pan and thereby move it into place.

4. During the repair operation hereinbefore described, defendant corporation negligently caused and permitted the metal bolt holding one side of the ash pan to the chain hoist to break, and the steel ash pan weighing approximately 150 to 200 pounds to drop down and swing to the rear and strike plaintiff in the face and on the body, thereby injuring the plaintiff.

5. As a direct result of defendant's said negligence plaintiff received the following injuries: a cut right eyelid and a blow to that area of the head, a broken and damaged nose, bruised and damaged ribs and nerves on the right side, and a bruising and tearing of the bones, nerves, muscles, and ligaments of the middle and low back and spine. Said injuries to the back and spine consist primarily of a compression fraction of the eighth dorsal vertebra and a nerve involvement in that region, and spondylitis of the spine in [fol. 3] the dorsal and lumbar areas, and a traumatic arthritis in the injured areas of the spine.

6. Plaintiff says that before the accident and injuries herein he was regularly employed by defendant as a boilermaker and earning approximately $300.00 per month; that immediately after the accident he was taken to the Newark City hospital where he was treated and stayed for several days, that thereafter he was taken to his home where he was confined to bed. That thereafter on about June 26, 1948, plaintiff returned to work where he was given light duties, but that on September 14, 1948, he was unable to continue by reason of his said injuries. That from said date to the present plaintiff has been physically unable to work by reason of said injuries, except for certain short periods when he attempted to work, all with attendant loss of earnings, and such disability and loss will continue for an indefinite time in the future, and plaintiff's said injuries are of a permanent nature and are disabling, and his earning capacity has been permanently impaired. At all times

since his injuries plaintiff has suffered intense pain and discomfiture, which will continue, and plaintiff has incurred, and will continue to incur doctor, hospital and medical expenses for treatment of his said injuries.

WHEREFORE, plantiff prays judgment against defendant corporation in the sum of sixty thousand dollars ($60,000.00), and his costs herein expended.

Herbert & Dombey, Attorneys for the Plaintiff.

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[fol. 4] IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 21, 1950

First Defense:

1. The defendant admits:

(a) the allegations contained in paragraph numbered one of the complaint except the allegation that at all times mentioned in the complaint, plaintiff and defendant were engaged in interstate commerce between the several states of the United States and the allegation that this action is brought under and by right of the laws passed by the Congress of the United States, each of which allegations the defendant expressly denies.

(b) the allegations contained in paragraph numbered two of the complaint.

2. The defendant denies:

(a) the allegations contained in paragraph numbered three of the complaint except the allegation that plaintiff was employed by the defendant as a boilermaker which the defendant admits;

(b) the allegations contained in paragraph numbered four of the complaint;

(c) the allegations contained in paragraph numbered five of the complaint;

(d) the allegations contained in paragraph numbered six of the complaint.

3. The defendant further denies each and every allegation in the complaint not hereinbefore admitted or denied

and denies that such injuries as the plaintiff did in fact sustain were a direct and proximate result of its negligence and denies that it was negligent in any of the particulars specified in said complaint or in any other particular.

[fols. 5-19] Second Defense:

4. The defendant avers that such injuries as the plaintiff did in fact sustain were caused solely by his own negligence and carelessness.

Third Defense:

5. If the defendant were guilty of any negligence causing such injuries as the plaintiff did in fact sustain, all of which the defendant expressly denies, defendant avers that the plaintiff directly and proximately contributed to such injuries as he did in fact sustain by his own negligence.

Wherefore defendant prays that the complaint of the plaintiff be dismissed and that it may go hence without day and recover its costs herein expended.

Alexander, Ebinger & Wenger, Attorneys for Defendant.

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[fol. 20] In United States District Court

Transcript of Hearing

Francis G. A. O'Neill, being first duly sworn as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Dombey:

Q. Will you state your name, please?
A. Francis G. A. O'Neill.
Q. Where do you reside, Mr. O'Neill?
A. 29 Webb street, Newark, Ohio.
Q. How old are you?
A. I was 48 last January.
Q. Are you married or single?
A. I am single now.

Q. You say you are single now? Were you married in the past?

A. Yes, sir.

Q. Do you have any children?

A. Yes, sir.

Q. How many children, please?

A. One boy.

[fol. 21] Q. Is anyone living with you, or with whom are you living now?

A. My mother.

Q. What was your occupation on June 22, 1948?

A. Boiler maker.

Q. With whom were you employed at that time?

A. Baltimore and Ohio Railroad.

Q. Where were you employed at that time?

A. Newark, Ohio.

Q. How long had you worked there, Mr. O'Neill?

A. I came back to Newark from Willard, Ohio, in 1945.

Q. I may have asked you this, but what type of work were you doing at Newark, Ohio, following your return from Willard?

A. Boiler maker.

Q. Now, will you tell the jury in your own words, generally, what that work entails, what you have to do.

A. We have repairs to boilers and tanks.

Q. What is a boiler on an engine?

A. Well, a boiler is a round part there of the locomotive.

Q. What type of repairs do you do to these boilers?

A. Different types we do, whatever may be wrong with them after the inspector goes over them and finds the defects, we would repair them.

Q. These repairs take place in a round house, do they?

A. Yes, sir.

Q. Now, what are known as the ash pans on an engine, Mr. O'Neill?

A. Well, that's part of the locomotive that fits underneath the fire box.

Q. Where is the fire box located on an engine?

A. Directly—the fire box is located in the rear of the boiler.

Q. Rear of the boiler?

A. Yes, sir.

Q. Where would that be with reference to the platform where the fireman and the engineer are stationed on an engine?

A. Well, the engineer——

[fol. 22] Q. Or, the cab of the engine, is what I had in mind.

A. The engineer is to the right rear of the fire box and the fireman to the left rear.

Q. Where is the front end of the cab located with reference to the fire box?

A. Well, the cab fits over part of the fire box on the outside.

Q. Now, in order to do that work, were you or were you not required to work in and about pits such as was shown here to the jury?

Q. I will ask you whether or not you can identify that exhibit as being one of the pits at Newark, or was on the date of your accident?

A. Well, that's a pit there, but whether or not it is the one I was working on I don't know.

Q. Are there more than one type of pits, there, Mr. O'Neill?

A. Yes, sir.

Q. Will you kindly tell us the different types that are located there and describe them to the jury?

The Court: What's the difference? Let's find out about this pit he was in.

Q. Now, will you kindly tell the jury, or describe to the jury this pit that you were working in on the date of your accident?

A. Yes, sir. It was about three and a half foot deep and about four foot wide.

Q. How long would it be?

A. About the distance from here to probably that wall, covers a whole locomotive and tender; goes over these pits.

Q. Would it almost be the length of a locomotive?

A. Locomotive covers over all the pit, yes, sir.

Q. What is the average length of a locomotive, would you say?

The Court: How far would you say it was from here to the back wall, can we agree on that, gentlemen?

Mr. Dombey: I think locomotives run somewhere from 60 to 80 feet.

[fol. 23] The Court: What do you say it is from where he is to the back wall?

Mr. Alexander: Seventy-five feet, would be my guess.

The Court: May we agree between us that it is somewhere between 60 and 70 feet from where he is sitting to the back wall? That gives you some idea, doesn't it, members of the jury?

Q. Now, you say that prior to working at Newark, Ohio, you were employed at Willard, Ohio?

A. Yes, sir.

Q. How long were you at Willard, Ohio?

A. I went there in 1939 and remained there until 1945.

Q. What type of work did you do there?

A. Boiler maker.

Q. When did you start with The B. & O. Railroad Company, Mr. O'Neill?

A. Sometime in 1920 or '21, I am not positive which year.

Q. And, have you worked continuously on the railroad since that time, with the exception of furloughs and off for different reasons?

A. Yes, sir.

Q. Now, Mr. O'Neill, will you tell the jury about what time you went to work on the morning of June 22?

A. 7 a. m.

Q. Will you tell the jury when you first started to work on this ash pan which you were going to attach to this engine?

A. I had been working on this same locomotive, the 2801, for three or four days previous to the date of this accident. I had already applied the front ash pan to this locomotive, and then on the twenty-second——

The Court: Already applied what?

The Witness: The front ash pan.

The Court: There are two ash pans on this locomotive?

The Witness: Yes, sir.

The Court: Do they adjoin each other?

[fol. 24] The Witness: Yes, sir.

The Court: Side by side or end to end?

The Witness: End to end.

The Court: This must be a pretty big locomotive.
The Witness: No, sir, not too large.
The Court: All right.

By Mr. Dombey:

Q. All right, sir, when did you start to work on this particular ash pan that you are going to attach to this engine?
A. Right around noon when we started the operation to put the back pan up.
Q. Now, let me ask you this. Was this the same ash pan that was located on this engine when it came in to be serviced?
A. No, sir.
The Court: You mean the back one or the one they were going to put up now?
Mr. Dombey: The one in question here, your Honor, the back one.
The Court: All right.
Q. What happened to the old ash pan that you removed from that engine? What was its condition?
A. I didn't remove it.
Q. Tell us what the fact is, what happened to it, if you know?
A. Probably warped and burnt and they removed it, had a new one made.
Q. Unless you know, Mr. O'Neill.

Mr. Alexander: Objection.
The Court: Sustained the objection. It may be stricken.

Q. Did you see the old ash pan, in other words?
A. No, sir.

The Court: He didn't take it off?
Mr. Dombey: Apparently not.
[fol. 25] Q. When did you first come in contact with the new ash pan, Mr. O'Neill?

A. We went to the boiler shop to pick it up and bring it over.
Q. When was that?
A. I believe it was on the date of the accident we went there and brought that.

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Q. Now, just from that point, and to the best of your recollection, tell the jury step by step what you did after came in touch with this ash pan.

A. Yes, sir. We brought the ash pan around to the left side of the locomotive.

Q. When you say we, will you tell us whom you have reference to?

A. The helper and I.

Q. Who is he?

A. Louie Jaynes.

Q. Go ahead.

A. Sitting there at the left side. I had the burner there. I burnt two holes through each side of the ash pan, large enough for a half inch bolt to go through these holes.

Q. Why did you do that?

A. In order to bolt the chain across the pan.

Q. Why was that necessary? This jury are not railroaders, Mr. O'Neill.

A. I had to have something bolted across there in order to have something to lift this hook on this pull jack. So, I bolted the chain across the pan and put these two half-inch bolts——

Q. May I interrupt you there? Will you tell the jury where you got these bolts?

The Court: What?

Mr. Dombey: Where he obtained the bolts.

The Court: First, I would like to know just where these holes were. Were they in the side, how far down, near the bottom, near the top?

The Witness: Yes, sir, they were on the side, down towards the bottom of the pan, right above the casting

The Court: Right above the bottom of the pan?

[fol. 26] The Witness: Right above the casting. They have a casting on their ash pan.

The Court: Have you got a picture of one of these? They keep calling them ash pans; they are ash boxes to me. Have you got a picture of one? I don't know what good, if I understand it, what possible good a chain would do in the bottom of it. I am going to find out here.

(Photograph is handed to the court.)

The Court: I would suggest—you don't have to—but I would suggest that you let the jury see what one of these ash pans, so-called, is like, so that when they say or when he says, "I put a chain across the bottom," why, they know what he means, or near the bottom. I was under the impression that he put a chain across the top so they could pull it up. That's what I thought. I think the jury would like to have a very clear picture of what happened there, just what it looked like.

Does this help you, members of the jury? Do these things help you?

(Jurors answer yes.)

The Court: I think we had better take a recess.

(Recess.)

Mr. Dombey: Your Honor, I am informed that that was not the type of ash pan that was used on this particular occasion by the witness.

The Court: If it gives the jury the wrong idea, never mind.

Mr. Dombey: May I have the last question, please?

The Reporter (reading): Will you tell the jury where you got these bolts?

The Witness: I went up to the tool room where they kept the supplies, picked me out two half-inch bolts and four washers and two half-inch nuts.

[fol. 27] Q. Then what did you do?

A. I went back down to the job, taking a burner torch and burned me two holes in the ash pan right above the casting, approximately 9/16, so these two half-inch bolts would go through these holes.

Q. Where is this casting on this ash pan located, Mr. O'Neill?

A. At the bottom of the ash pan.

Q. What would be the width of that cast?

A. About six inches.

The Court: Isn't the casting really the support of the ash pan, something that it rests on?

Mr. Dombey: I don't believe so.

The Witness: No, sir.

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Mr. Dombey: Just the reinforced part where the hot fire gets in there so it doesn't burn there.

The Court: It is a reinforced bottom on which it rests. I mean, if you stand on the floor, it would rest.

Mr. Dombey: Yes, your Honor.

The Court: That's what I said.

Mr. Dombey: I misunderstood you, because it is fastened from the top.

Q. Now, you say that the cast is about six inches off the bottom of that ash pan, is that right?

A. Yes, sir.

Q. Now, where did you place those holes with reference to the upper edge of that cast?

A. Right above the casting.

Q. And, that would be about how far off the bottom of the cast?

A. Probably——

Q. —the ash pan.

A. Probably about seven inches.

Q. Now, did you at that time perform that work yourself or was anyone assisting you?

A. The helper was there with me, Mr. Jaynes.

Q. Tell the jury what you did after you got these holes burned, with respect to placing these bolts, and what your helper did?

A. We got the bolts ready and slipped the holts through one of the half-washers.

[fol. 28] Q. Now, did both of you do that? Which one of you did that, Mr. O'Neill, that's what I want to know?

A. If I remember correctly, I placed the bolts through the ash pan and he put the washer on to thread it into the bolt and screwed the nut onto the bolt.

Q. What, if anything, was located between these two bolts?

A. We fastened the chain.

Q. That chain ran inside the ash pan, did it?

A. Yes, sir.

The Court: May I ask if the head of the bolt is on the outside or the inside?

A. We placed the head of the bolt on the ash pan, on the outside of the ash pan.

The Court: On the outside?

The Witness: Yes, sir.

The Court: And, how big a chain was it?

The Witness: Well, the links of the chain were approximately 5/8 in diameter.

The Court: Is it loose across the bottom or tight?

The Witness: I stretched it as tight as I could.

The Court: And, the bolts do that, don't they?

The Witness: Pulled the links as tight as we could and then placed the bolts between the links of the chain.

The Court: And then tightened them up, and the tighter you tighten them, the tighter the chain is, is that right?

The Witness: Yes, sir, we tightened it up some.

The Court: And it is just about across the middle of it?

The Witness: The ash pan, yes, sir.

The Court: All right. I think we are beginning to get it.

By Mr. Dombey:

Q. All right, having performed that what did you do next, or your helper, Mr. O'Neill?

A. We sent for the crane. The crane man come down there, run his hook down and taken a hold of this chain I had fastened across the ash pan, raised the pan up and placed it down into the pit.

[fol. 29] Q. When he placed that in the pit, where was the engine to which it was to be attached?

A. We placed the ash pan right directly back of the engine. The tank was pulled back away from the locomotive.

Q. Then after it was placed in back of the engine, did it have to be moved in any direction in order to get it to its point of location?

A. Yes, sir.

Q. In which direction would you move it?

A. We had to move it ahead.

Q. How was that done?

A. The helper and I were down in the pit and shoved it ahead.

Q. You shoved it?

A. Yes, sir.

Q. Now, when you got it to the point of location on the floor where you wanted it, what was done next?

A. We got the pull jack and fastened the chain around the bar up inside of the fire box, hung the pull jack onto this chain.

Q. Now, first of all, Mr. O'Neill, will you explain to the jury what is meant by a pull jack and how it operates?

A. Well, a pull jack is the same as a block and fall.

The Court: That has helped them, I am sure.

A. That's my mistake, I guess. It is just a piece of machinery that we have in the locomotive shop to raise any heavy object that we can't lift.

Q. How do you work it? Is it manually worked?

A. It has a handle on it.

Q. What do you do with that handle?

A. You work it up and down.

Q. Just like the old-fashioned tire jack?

A. It works a good deal like a pump handle.

Q. Now, what would be the approximate size or what was the size of this jack, Mr. O'Neill?

A. Well, it was kind of a complicated looking piece of machinery. I don't know if I can explain it to them or not. [fol. 30] Q. Can you give its dimensions? How high does it stand off the floor?

A. Well, is doesn't stand. You can just move it around; it has the hook on the top edge of it that you can hook on to your chain, it has a chain that runs down from it in order to hook what you want to lift.

The Court: Was this inside the locomotive, or——

Mr. Dombey: I was just getting to that.

Q. Where was this jack when—when you placed this jack where was it in order to do this job? Where did you place it?

A. Up in the fire box.

Q. Of the engine?

A. Yes, sir.

Q. Now, where would that jack be with relation to the ash pan that was setting on the floor in the pit?

A. Directly above it.

Q. About how high above it?

A. Well, I would say maybe four foot.

The Court: Four foot above the top of it?

The Witness: Yes, sir.

Q. All right. Now, tell the court and jury how it was stationed in the fire box. Was it setting on something or was it attached to something?

A. It was attached to another chain.

Q. Where was that chain attached to?

A. If I remember correctly, the chain was placed around what we call the center bar.

Q. Located in the engine?

A. Yes, sir.

Q. Now, will you kindly tell the jury what the dimensions of the fire box are from its lowest point to its highest point?

A. I would say about ten foot from the bottom of the mud ring to the top of the fire box.

Q. I will ask you whether you assisted in taking that jack into that engine?

A. Yes, sir, I believe I did.

Q. Now, after that jack was placed in that box, what was done, then, to attach it to the chain in the fire box—I mean [fol. 31] in the ash pan?

A. Well, Mr. Jaynes started operating the handle to leave the hook on it.

Q. No, I am afraid you don't follow me. Tell the jury how the mechanism of that jack was attached to the chain in the ash pan. Was there another chain or was it directly in contact with the jack itself?

A. We had to run the chain down from the pull jack in order to connect on to the chain that I had in the ash pan.

Q. That's what I want to know. So you had one chain connected on to the chain in the ash pan?

A. Yes, sir.

The Court: Is there a hook at the end of it?

The Witness: Yes, sir.

The Court: That's what he wants.

Q. Now, having connected that, where did you go?

A. I went into the pit.

Q. Where did your helper go?

A. He remained up in the fire box.

Q. Where did you go down into this pit?

Mr. Alexander: Just a minute. Can't this man tell his story without being led?

The Court: I don't think he is being led. What is the objection to the question?

Mr. Alexander: That it is leading.

The Court: Let's see if it is leading. What is the question?

(Question read.)

The Court: I don't see anything leading about that. I don't see how you can have a leading question unless it suggests the answer.

Mr. Alexander: Did he go down into the pit?

Mr. Dombey: He has already testified he went down into the pit.

[fol. 32] The Court: Overruled. Why did you go down?

The Witness: I went down to steady the ash pan as he was pulling it up.

By Mr. Dombey:

Q. In order to do that, will you tell the jury what position you would assume in the pit?

A. I was standing and stooped over, my hands on the ash pan to level it so it wouldn't tilt either way.

The Court: May I ask this to see if I get a right idea of this. The chain is down in the bottom of that ash box, isn't it?

The Witness: Yes, sir.

The Court: And if you were to pull the box right up it would wiggle from side to side, isn't that right?

The Witness: Yes, sir.

The Court: Is that what you mean?

The Witness: Yes, sir.

The Court: So you went down there to hold it while it was being jacked up into position, is that right?

The Witness: Yes, sir.

The Court: All right.

Q. Now, what is the purpose of steadying it, as you stated?

A. Just like I said, if I hadn't steadied it it would no doubt——

Q. Where were you trying to steady the thing to?

A. I was trying to hold it level until they got it up to position.

Q. What position?
A. Up to where it belonged.
Q. That's what I want to know.

The Court: Let's get that. Is it part of your duty to guide it into position from the bottom?
The Witness: Yes, sir.
The Court: That's what you are getting at?
[fol. 33] Mr. Dombey: No, your Honor, I wanted to show where it has to be put and how it was to be guided and where it is to be fastened.
The Court: I just said guide.
Mr. Dombey: That was a help. I should have gotten that in there.
The Court: That's what he is there for. He goes down, they pull it up. Of course, if there is nobody down below it flops around. He is down there to guide it into position. Isn't that what you are there for?
The Witness: Yes, sir.

Q. And, the position that the court just referred to is the position so that you can do what with this ash pan?
A. To steady it and get it up into position.
Q. What is the position, what does that mean?
A. To go on up with it.
Q. To where?
A. Up to fasten on to the ash pan wing.
Q. When you get it in that position, then what are you able to do? How do you fasten it to the engine?
A. If we had got it into position we would have fastened it through the half-inch holes into the ash pan wing, and the half-inch holes were into the ash pan where they come together and would place half-inch bolts between there to hold it.
Q. Now, did you get it in that position?
A. No, sir.
Q. What happened?
A. The bolt broke and down came the pan.
Q. What happened to you?
A. I was wedged between the ash pan and the frame of the locomotive.
Q. Now, will you tell the jury which end of that ash pan came down, with reference to where you were standing? Was it the nearest side to you or the opposite side?

A. The right side of the ash pan fell.

[fol. 34] Q. Which would be the right side with reference to your position, where you stood?

A. I was over to the left side of the——

Q. In other words, it would be the farthest side away from you?

A. Yes, sir.

Q. You say it wedged you. Then what happened?

A. I had taken my arm and shoving the weight away from me, and I turned and walked to the rear of the locomotive and attempted to crawl out of the pit, and Mr. Mitchell was there and assisted me out, and then they laid me on the floor there.

The Court: Who is Mitchell?

The Witness: He is the boiler washer there at the shop.

Q. After you got out of the pit what did you do, or, what was done for you?

A. They laid me there and Mr. Mitchell was also the first aid man. He went after his kit on up through the shop there, and by then the general foreman, Mr. Thomas, came there, got down on his hands and knees and wanted to know if I wanted to go to the hospital, and I told him I would rather they get a doctor down there to look at my back because I thought it was broken.

Q. What was the condition of your face at that time, if you know, Mr. O'Neill?

A. My face was covered with blood.

Q. Could you feel the blood; is that the way you knew it?

A. Yes, sir.

Q. Was a doctor summoned?

A. Yes, sir.

Q. Who was the doctor?

A. Doctor Pickett.

Q. I assume that you stayed in that position until Doctor Pickett arrived?

A. Yes, sir.

Q. Is Doctor Pickett the B. & O. Doctor, do you know?

A. Yes, sir.

[fol. 35] Q. What was done after Doctor Pickett got there?

A. Well, the first thing he done, he stooped over me and

run his hands across my face to see whether or not my eye was injured, and he unloosed my overalls and shirt and felt down my spine, and I heard him tell the first aid man that he didn't think my back was broken, and he directed them how to place me on the stretcher.

Q. Was that done?

A. Yes, sir.

Q. Where did they take you from there, Mr. O'Neill?

A. The Newark City hospital.

Q. What was done for you after you were taken into the hospital?

A. The first thing he done is sewed my eye up.

The Court: He did what?

The Witness: Sewed my eyelid up first.

The Court: All right.

The Witness: Then they removed me to the X-ray room and X-rayed my back, taking me up stairs and wrapped some kind of a gauze bandage around my chest and placed me in bed.

Q. Now, did you have any conversation with Doctor Pickett about the condition of your back after the X-rays were taken?

Mr. Alexander: Objection, to what his conversation with Doctor Pickett was.

The Court: Where?

Mr. Dombey: At the hospital after the X-rays were taken.

The Court: I will sustain the objection.

Mr. Dombey: Exception.

Do I understand that I am not permitted to go into any conversation between this man——

The Court: Let Doctor Pickett tell what was wrong with him.

[fol. 36] Mr. Dombey: I am referring to the conversation, your Honor, that he had with——

The Court: I have sustained the objection.

Mr. Dombey: Exception.

Q. Following that, the taking of the X-rays, you say you were placed in bed. How long did you remain in the hospital, Mr. O'Neill?

A. I believe it was three days.

Q. Was Doctor Pickett in attendance during this three-day period?

A. Yes, sir.

Q. Where did you go and under what circumstances did you leave the hospital?

A. Doctor Pickett came in one morning with a nurse and told me that I could either stay there or go home.

Q. And, what did you do?

A. I decided to go home.

The Court: When was this, did he say?

Mr. Dombey: Three days later.

Q. So you went home. Tell the jury what happened after you went home. First, what time did you get home?

A. I believe it was around noon.

The Court: Have you fixed the day of this accident?

Mr. Dombey: June 22, your Honor. This is the 25th.

Q. What happened after you got home? What did you do?

A. Well, they placed a chair for me on the front porch and I was sitting there on the front porch.

Q. Then what happened?

A. Mr. Thomas from the Baltimore and Ohio shop come up to my home.

Q. Who is Mr. Thomas?

A. He is the general foreman there in the locomotive shop at Newark.

Q. Had you known him prior to this accident?

A. Yes, sir.

Q. Tell what transpired between you and Mr. Thomas?

A. He asked me to come back down to——

Mr. Alexander: We object to any conversation between Mr. O'Neill and Mr. Thomas.

[fol. 37] The Court: On what ground?

Mr. Alexander: Hearsay.

The Court: Overruled.

Q. Go ahead, Mr. O'Neill.

The Court: He is one of your employees.

Mr. Alexander: If they want him to testify, let them call him.

The Court: I don't think so.

Mr. Dombey: His testimony wouldn't be any better than Mr. O'Neill's.

Let us have the last question, please.

(Question read.)

A. Mr. Thomas asked me to come down to the shop and put my time in there, and assured me that I wouldn't have to do no work, just that I would make my appearance so they wouldn't have to report this injury to the Interstate Commerce Commission.

Mr. Alexander: We are objecting to the answer and move that it be stricken.

The Court: You may proceed.

Q. What did you do in pursuance to that suggestion, Mr. O'Neill?

A. I told him that I would go down.

Q. And, did you go down?

A. Yes, sir. He helped me down off the porch and put me in his car.

Q. Put you in his car, and then you went there?

A. He had taken me down to the boiler shop, and I went into the boiler foreman's office and sit down.

Q. How long did you stay there that afternoon, Mr. O'Neill?

A. Probably an hour, an hour and a half.

Q. What did you do while you were there?

A. I just sit there in a chair.

Q. Did you make out anything?

A. One of the helpers come over and I sent him after my card, and he brought it over to me and I made it out, and [fol. 38] they placed it in the rack where they picked the cards up.

Q. What is this card for?

A. For my wages.

Q. Did that card cover your wages for the entire day?

A. Yes, sir.

Q. Now, what happened the next day?

A. I went back down the next day.

Q. How did you get there?

A. I walked.

Q. What did you do there the next day?

A. Just about the same as I done the previous day. I sit down there and the helper went out and got my card, and I made it out and he had taken it back out and put it in the box there, and I stayed there maybe for an hour, an hour and a half, and went home again.

Q. What did you do on the third day?

A. The same as the previous day.

Q. Now, will you tell the jury what your condition was in that three-day period, your physical condition?

A. My back was hurting me horrible.

Q. And, after the third day what was the condition of your face during this three-day period?

A. My face was pretty well scarred up.

Q. What, if any, injury did you receive to your nose as a result of this accident?

A. My nose was broken.

Q. Then, following the three-day period what did you do?

A. I continued to go down there every day and make my card out.

Q. How long did that go on?

A. Up until and including the fourteenth of September.

Q. Did you during that period do any manual work at that place of employment?

A. No, sir.

Q. Following that what did you do?

A. Well, all this time that I was staying around there and without doing any work at all, this master mechanic con- [fol. 39] stantly kept after my foreman to put me to work doing something that was just light, and all this time Dr. Pickett insisted that I shouldn't do anything, and I didn't do no work. So, this master mechanic calls me into the office, insisted on me going to work, and I refused to go on the strength of what Doctor Pickett told me. So at that time I sent for our general chairman from the boilermaker's organization.

Q. You don't have to go into that. Just tell us whether you worked after that period or not?

A. No, sir, I didn't.

Q. How long were you off work, Mr. O'Neill?

The Court: How long was he on there after his accident?

Mr. Dombey: September 15, I believe he testified.

The Court: From June until September 15. And he says he didn't do any work at all during that time, just sat there and drew his pay?

The Witness: Yes, sir.

Q. How long were you off following September 15? That would be 1948.

A. Until February 21 of 1949.

Q. Then what happened after February 1, 1949?

A. Contacted this general chairman of the boilermaker's organization.

Q. No, let's leave all that out. What did you do after that date?

A. I went back to work on a trial period.

Q. When you got back there what type of work did you do?

A. Nothing heavy, mostly putting these front ends in the smoke boxes.

Q. What type of work is that, as far as being heavy work or otherwise?

A. It is not heavy. It is considered light work, as a boiler maker.

Q. Tell the jury what experience did you have in connection with your physical condition while you were performing that work?

A. My back was hurting constantly.

[fol. 40] Q. Which part of your back?

A. Around towards the top there, around the right side.

Q. Mr. O'Neill, when Doctor Pickett took these X-rays or caused these X-rays to be taken of your back at the hospital did he report to you what his findings were or what the X-ray pictures showed?

A. Yes, he did tell me.

Mr. Alexander: I object to the conversation with Doctor Pickett.

The Court: Is Dr. Pickett going to be here?

Mr. Alexander: Yes, sir.

The Court: Why shouldn't he tell that?

Mr. Dombey: All right.

Q. How long did you work on this trial period, Mr. O'Neill?

A. I worked about three weeks and they furloughed us.

Q. Then what did you do after this furlough?

A. We were off then, I imagine, a week or two and they called us back.

Q. Did you go back?

A. Yes, sir.

Q. How long did you stay there?

A. Come back on the fourth of April and worked until the seventh of April, was the last day I worked.

Q. Now, will you tell the jury what type of work you did in that period and what your physical condition was; that is, what effect it had on you?

A. Well, I didn't run into no heavy work during that period. I was—it was mostly lighter type work.

Mr. Alexander: If the court please, we are objecting to his answer as not being responsive to the question. If he wants to describe the work he did, that is one thing, but to come to a conclusion that it was light or heavy, that is another thing.

[fol. 41] The Court: As I understand, if the answer was not responsive, the only person that can object to it is the person that asked it.

Mr. Alexander: It is my understanding that if the answer is not responsive that we would have a right to object to it.

The Court: No, that is not true, as I understand the rules of evidence. I think it is a foolish rule, myself, but I think if you will look it up, that is what it is. There are other objections you can make, but not on the ground it is not responsive.

Mr. Alexander: Let him describe his work.

The Court: You can cross examine. He says it is light work. Light work for him may be moving a house, for all I know. Now, if they don't get the information over to the jury, that is their fault. He may say that it was light work, not heavy work, that he had been doing.

Q. Now, Mr. O'Neill, you heard Mr. Ebinger in his opening statement make reference to you taking unemployment compensation during that period. Will you tell the jury just what transpired in that respect?

A. Yes, sir.

Q. All right.

A. When I was furloughed—I say, I was working that trial period—I just wasn't sure what to do. So I went up into the master mechanic's office and talked to that man there from the railroad board, and explained my case to him and asked him what I should do. So he suggested to me to sign for that unemployed insurance.

Mr. Alexander: I object to that.

The Court: Who is he connected with? Who is this man connected with that he went to?

Mr. Dombey: We don't know. He went to the B. & O. master mechanic's office.

The Court: The defendant's office?

Mr. Dombey: Yes.

[fol. 42] The Court: Does he give the name of the man so they can bring him in here?

Q. Do you remember the gentleman's name who was the master mechanic then?

A. I didn't go to the master mechanic. I went to this man that represented the railroad board to sign up for this unemployed insurance.

Q. He is the one that you explained it to?

A. Yes, sir.

Q. I thought you said you went to the master mechanic's office?

A. He was up in his office.

Q. Was he the only one you talked with?

A. Yes, sir.

Q. Now, Mr. O'Neill, there are also sick benefits that you are entitled to when you are off, is that true?

Mr. Alexander: Object to that.

The Court: What is the purpose of this? Does this make any difference one way or the other?

Mr. Dombey: It seems to, to them. They are pointing out the fact that he took out unemployment insurance in which he had to sign he was fit for work and therefore he was not injured. That's the only thing I could gather from the opening statement.

The Court: If a man gets unemployment compensation—I suppose the same rule is in Ohio as it is in Michigan?

Mr. Dombey: It is not.

The Court: You mean you can be sick in bed and get unemployment compensation in Ohio, is that true?

Mr. Dombey: No. I say, as far as the benefits under the unemployment compensation and the sickness benefits under the railroad retirement board are absolutely——

The Court: Let's take them one at a time. I am talking about unemployment compensation.

Mr. Dombey: The difference is that in unemployment compensation on the railroad if a man recovers for his injuries he has to return that to the railroad retirement board, whereas that does not obtain in the State of Ohio.

[fol. 43] Mr. Alexander: If the court please——

The Court: As to the unemployment compensation, may I ask, it is the same rule in Ohio as it is in Michigan, that the man must be able to work and willing to work if he can find work?

Mr. Dombey: Your Honor, may I take exception to the court's observation?

The Court: The court has made no observation. I am trying to find out what the rule is.

Mr. Dombey: I want to bring to the court's attention that we are trying this case under the Federal Employer's Liability Act and the railroad retirement board, United States government act, and not the act of the state of Ohio or any other state, and it is controlled solely and exclusively by the provisions of the railroad retirement board and not any laws of the state of Ohio. And one of the provisions is that sickness benefits and unemployed benefits—this is the law and the court will take judicial notice of it I am sure—are one and the same, both to be returned in the event that the employee recovers for that loss of time by reason of his injuries.

The Court: He is not in the position of, oh, Bill Brown, that works for the Columbus Hardware, is that true?

Mr. Dombey: That's the point I am making.

The Court: Is that true? Gentlemen, you ought to be able to agree on the law on that. You may approach the bench.

(Discussion between counsel and the court.)

The Court: There is a difference, ladies and gentlemen, except in this. Counsel are agreed that under the Federal

Employer's Liability Act that you must, if you get unemployment compensation—what happens to it afterwards is something else—you must assert that you are able and willing to work.

[fol. 44] Now, what about your sickness benefits. Do you want to bring that in?

Mr. Dombey: Your Honor, as I made this statement, that's the reason we—first, the witness has testified to the fact that he laid his case out before this representative and he went ahead and suggested as to the type of form to be filed. I submit to your Honor that for all practical purposes it make- no difference—I wish you would sit down.

Mr. Alexander: I make an objection to his making an argument to the jury.

The Court: Make it from back there. Please don't argue your case.

Mr. Alexander: That is my objection.

Mr. Dombey: Your Honor, I am stating the provisions of the law, and I stand to be corrected, because this court is going to take judicial notice of the law. If I am in error I am sure the court is going to instruct the jury otherwise. I am stating the law as I understand it, and it is not complicated in any way at all. The observation that I was making that sickness benefits——

Mr. Alexander: If the court please——

The Court: Wait a minute. He has the right. In your statement to the jury made at the beginning of this case you mentioned the fact that he got unemployment compensation. I think you mentioned sickness benefits, too.

Mr. Alexander: No. Unemployment compensation.

The Court: Never mind the sickness benefits. They didn't mention it. If that comes up I will let you explain it.

Mr. Alexander: If the court please, it hasn't been our practice to argue the law of a case openly like this. We have approached the bench and discussed the law with the court.

The Court: There isn't any question about it, gentlemen. You were right on that. But, I didn't think there was any [fol. 45] question about this and there isn't any question. What secret is there?

Mr. Alexander: Nothing.

The Court: You mentioned it in your opening statement,

and when anybody opens the door, the other fellow can go through. You can't say, "I will open the door until I go through and then shut it." You brought up the question of unemployment compensation. He certainly has a right to explain how that happened, and the court is going to permit him to. Now, the effect of that is something else, and the law. I suppose that in this state—well, it is the same as it is in Michigan. One who gets unemployment compensation in Michigan must be able and willing to work.

Mr. Alexander: That's right.

The Court: That is true in Ohio, but under this act, as I understand it, you have a way of refunding in the event of certain contingencies coming up. But, you brought up unemployment compensation. You may develop it.

Mr. Dombey: I don't care to dwell on it any more. I am perfectly satisfied the court understands our position.

The Court: As long as the jury does. You will find it will be more important to have the jury understand your position than the court. I am not saying one thing or the other.

Mr. Dombey: Will you read the last question, please?

The Reporter (reading): Now, Mr. O'Neill, there are also sick benefits that you are entitled to when you are off, is that true?

Mr. Dombey: I will withdraw that since the court has ruled on that.

Q. When was the last day that you worked, Mr. O'Neill?

A. April 7, 1949.

Q. Now, tell the jury what type of work, if any, that you have been doing since that date?

A. None.

[fol. 46] Q. Will you tell the jury what your physical condition is as to being able to do railroad work?

A. Well, I don't believe I am able to perform those kind of duties any more, because my back hurts me all the time.

The Court: Do you want this jury to hear what you have got to say?

The Witness: Yes, sir.

The Court: You want me to hear, don't you?

The Witness: Yes, sir.

The Court: You will have to talk up. I just hear you mumbling to yourself.

Mr. Dombey: May we have that last question read?

(Last question was read.)

Q. Tell the jury whether or not you tried or tested yourself to see whether or not you could do your former work of boiler maker on the railroad?

Mr. Alexander: I object to that. Let him develop what he did, not ask him what he tried to do.

The Court: May I have that question? I was under the impression the question was all right.

(First part of question read.)

The Court: The question is all right. You may answer.

Q. Do you understand the question?

A. I believe I do.

Q. All right, answer.

A. When I was working this trial period, I come to more or less conclusion that I wasn't going to be able to go into that heavy work any more. Once when I was putting that front end in I had a terrible pain hit me in the back and I had to crawl down out of the smoke box, rest myself agin the wall.

The Court: Any objection to that?

Mr. Alexander: Objecting to the answer, your Honor.

The Court: All of it?

Mr. Alexander: All of it.

[fol. 47] The Court: The objection is overruled on all of it. The court of its own motion will strike out that part of the answer where he said, "Arrived at the conclusion I wouldn't be able to do any heavy work any more." That is a conclusion and it is not evidence at all. The rest of the answer is all right.

Q. Now, Mr. O'Neill, will you tell the jury what your monthly earnings were immediately prior to this accident?

A. Around $285 or $300 a month.

Q. And, I believe you gave your age as being what?

A. Forty-eight last January.

The Court: Didn't you want him to testify to the fact that there had been a raise in the railroad for some of these people in the same job he was in?

Q. Do you know, Mr. O'Neill, whether or not there have been any raises granted to your class of employees since you left the railroad?

A. Yes, sir, I believe there has been several, but I just don't know what the amount is.

The Court: All right, you can't guess. I thought you mentioned in your opening statement that that's what you would prove.

Q. Now, going back to your accident. I believe you testified that you were guiding this ash pan and that your helper, Jaynes, was located in the fire box?

A. Yes, sir.

Q. Now, after the ash pan was being raised, state to the jury whether or not you had any communications or conversations with Mr. Jaynes?

A. Not that I remember of.

Q. Now, to what height would you say that this ash pan was raised before it gave way?

The Court: You mean off of the pit floor, is that right?

Q. And in proximity to the engine where it was to be fastened?

A. Do you mean from the top of the pan or the bottom?

[fol. 48] Q. From the top of the pan.

The Court: What do you mean?

Mr. Dombey: From the top of the ash pan to where it was to be fastened to the engine, your Honor.

The Court: All right. Don't you have to know how far he had gotten it off the bottom of the pit?

Mr. Dombey: I don't know whether that would settle the other.

The Court: All right, suit youself.

Q. Do you understand my question, Mr. O'Neill?

A. If you mean from the top of the ash pan, I do.

Q. Yes.

A. I would say about four and a half or five foot to connect on to the ash pan wing.

Q. Where was the top of the ash pan with reference to the portion of the engine where it was to be attached at the time it gave way?

A. Well, it was starting into the wing, right where it was supposed to be.

Q. Now, I will ask you whether at that time you could see your helper, Mr. Jaynes, in that fire box?

A. No, sir.

Mr. Dombey: That's all.

The Court: Now, as long as you got that, and so that we can all understand it, from the botom of the pit from where this ash box—I still insist it is a box—fitted on to the engine was about seven feet.

Mr. Dombey: Around six feet.

The Court: Do you want it six or seven?

Mr. Dombey: I am not in position——

The Court: What do you say it is? From the bottom of the pit where you were working to where that fitted on to the fire box or the locomotive, how far was it from the bottom to where that was, where it would fit on?

The Witness: I would say it would be seven foot or better. [fol. 49] The Court: All right, seven feet. And, it is about three and a half feet deep, is it, the ash pan or ash box?

The Witness: I would say about three foot deep.

The Court: Therefore, if you are right in your figures, the bottom of that ash pan must have been about four feet from the pit in which you were standing. That is my understanding, and I am sure it must be the understanding of the jury, and if that isn't true, I would like to have you—you shake your heads, gentlemen.

Mr. Dombey: I would like to have the witness answer your question, your Honor.

By Mr. Dombey:

Q. What was the fact? Would that be four feet off?

A. Four foot.

The Court: Four feet from the bottom of the ash pan to the bottom of the pit where you where standing. Would that be about right?

The Witness: I don't understand what you mean, now,

Q. If that ash pan were attached to the engine what would be the distance between the bottom of that ash pan and the floor of the ash pit. Is that what the court would like to know?

The Court: Yes, the pit where you are working.

The Witness: I would say about five foot from the bottom of the ash pan to the pit.

The Court: Then if the ash pan is three and a half feet deep and you were about to fit it on to the fire box up there, then the fire box must be about eight or eight and a half feet from the bottom of the pit where you were working, isn't that true?

The Witness: I was just guessing at it roughly.

The Court: Well, a foot is quite a bit under some circumstances. It isn't when you talk about a mile.

[fol. 50] All I am trying to do, gentlemen, is to give this jury a picture of this, and I am sure that they must have the same idea. Any way, it was four or five feet from the bottom; either four feet if it is seven feet, five feet if it is eight feet.

Are you going to have any pictures of that at all?

Mr. Dombey: We don't have any.

The Court: Of the ash pan, the ash box?

Mr. Dombey: We don't have any.

The Court: All right. Are you ready for cross-examination?

Mr. Dombey: Yes, we are finished.

The Court: We will adjourn this case. I have another matter here. We will adjourn it until half past one. You are not to discuss this case with yourselves nor with anybody else, nor permit anybody to discuss it with you. It somebody tries to discuss it with you, let me know. I will take care of them.

Monday Afternoon Session, May 12, 1952

FRANCIS G. A. O'NEILL, resuming the stand, testified further as follows:

Cross-examination.

By Mr. Alexander:

Q. Mr. O'Neill, you reside at Newark, Ohio, I believe, with your mother?

A. Yes, sir.

Q. What is your marital status, Mr. O'Neill?

A. I am divorced.

Q. How many children do you have?

A. One boy.

Q. And, how old is your son, Mr. O'Neill?

A. He was 25 the fourth of this month.

Q. Is he living at home with you?

A. No, sir, he is in the Navy.

Q. How long did you serve as an apprentice boiler maker, Mr. O'Neill?

A. Four years.

[fol. 51] Q. What are your duties as an apprentice boiler maker?

A. Well, for the first several years I worked helping the boiler maker. They started me working myself with a helper.

Q. You assist a boiler maker and work under his direction as an apprentice boiler maker?

A. Yes, sir.

Q. When did you become a boiler maker?

A. 1927.

Q. Will you state what your duties are as a boiler maker?

A. The repair of boilers, tanks.

Q. Repair of boilers and tanks?

A. Yes, sir.

Q. Now, when you become a boiler maker you have a helper to assist you in your work, is that right?

A. Yes, sir.

Q. And, this man Jaynes that you told the jury was working with you on June 22, 1948 was your assistant and helper on that work that day, is that right?

A. Yes, sir.

Q. Now, you were off work in 1940, sick, between five and six months, weren't you, Mr. O'Neill?

A. I don't recall of 1940 or not.

Q. It was when you were suffering from the glandular trouble, is that right?

A. Well, they diagnosed my case as goiter there in Baltimore, but I don't know if that was the year or not.

Q. At that time you were off for several months, is that right?

A. I was off several months, yes, sir.

Q. Now, in 1945 you were off from work sick for 29 days because of a nervous condition, were you not?

A. Yes, sir.

The Court: In when?

Mr. Alexander: In July of 1945, your Honor.

Q. In December of 1945 you were absent from work, sick, because of a nervous condition for about seventy days, isn't that right?

A. Well, I don't recall all those dates. I was off several times.

[fol. 52] Q. In 1945 and 1946?

A. I don't remember those were the years or not. They may have been.

Q. If your work record with the railroad showed you were off 205 days in 1945 and 1946, would you disagree with that record?

A. No, sir.

The Court: Do you mean 205 days each year?

Mr. Alexander: No, 205 days in those two years, your Honor.

Q. You were sent to a Doctor Clybourne to be examined by your attorney for the purpose of testifying in this case, were you not?

A. Yes, sir.

Q. Now, in the history that you gave Doctor Clybourne you didn't tell him anything about this nervous condition, did you?

A. Not as I recall. He didn't ask me.

Q. Now, on July 11, 1947, a foreign substance got into your eye, didn't it?

A. If I recall right, it wasn't in my eye; it was below my eye.

Q. Below your eye?

A. Yes, sir.

Q. Now, in the history you gave Doctor Clybourne, did you tell him about that injury?

A. No, sir.

Q. Now, on August 24, 1947, you sustained a fracture of your left hip, did you not?

A. Yes, sir.

Q. That was about ten months before this accident, isn't that right, this accident of June 22, 1948?

A. Yes, sir.

Q. You were in an accident and sustained a fracture of your left—?

A. Yes, sir.

Q. And you were off sick with that for eighty-one days, were you not?

A. Yes, sir. I don't know if that was the exact amount of days or not, but I was off sometime with it.

Q. Now, did you tell Doctor Clybourne about that accident?

A. No, sir.

Q. Prior to June 22, 1948, the date of this accident in Newark, Ohio, you sustained an anjury to your back, didn't you?

A. Not that I recall of, no, sir.

[fol. 53] Q. Let me refresh your memory. Do you recall when we took your deposition in my office and I asked—do you recall us taking your deposition?

A. Yes, sir.

Q. Do you recall me asking you if you didn't tell Doctor Pickett at the time of the examination on June 22, 1948, "that you have sustained an injury to your back prior to this June 22, 1948?"

A. I misunderstood you. I thought you meant there in Newark. I did tell Doctor Pickett that I had an injury in Willard, Ohio.

Q. You pulled something loose in your back at Willard, Ohio, didn't you?

A. I didn't know it was something pulled loose or not, but there was a pain in my back.

Q. Well, you sustained an injury to your back, didn't you?

A. Yes, sir.

Q. And, you were off approximately a month with that injury, were you not?

A. I didn't know it was that long.

Q. Well, I will ask you to refresh your memory, if you didn't state to me at the time of taking your deposition: "I was taking out some grab bars on a locomotive one day. I strained my back or pulled something loose. Q. Were you off as a result of that? A. Yes, sir. Q. How long were you off? A. Probably three weeks and possibly a month." That question was asked you and that answer given, isn't that right?

A. Yes, sir, I imagine.

Q. Now, you didn't tell Doctor Clybourne about that injury either when you were giving your history to him, did you?

A. No, sir.

Q. Now, going back to June 22, 1948, the day of this occurrence, you had a helper working with you by the name of Jaynes, didn't you?

A. Yes, sir.

Q. And your job was to attach an ash pan to a locomotive, isn't that right?

A. Yes, sir.

Q. And, you were in charge of that work, were you not?

A. Yes, sir.

[fol. 54] Q. You cut the two holes in the ash pan with a torch, didn't you?

A. Yes, sir.

Q. You went to the store room and selected two new one-half inch bolts, a half-inch in diameter, for this work, did you not?

A. Yes, sir.

Q. When you went into the tool room you could have selected any size bolt that you wanted for this job, could you not?

A. Yes, sir.

Q. Now, after you got the bolts you went back to your work and you bolted the chain to the pan, didn't you?

A. Yes, sir.

Q. And you put the chain in the middle of the pan so that pan would balance when it was being hoisted, didn't you?

A. I didn't make no measurements on it, whether I had it directly in the middle or center. I roughly got it to center as closely as I could, without measurement.

Q. That was your purpose, to try to get it as closely in the center as possible, isn't that right?

A. Yes, sir.

Q. Then you had a crane lift the pan over into the pit, didn't you?

A. Yes, sir.

Q. And you and your helper, Mr. Jaynes, pushed the pan forward under the locomotive, didn't you?

A. Yes, sir.

Q. And, you and your helper both got up into the fire box of the locomotive and attached the pull jack to the chain, didn't you?

A. Yes, sir.

The Court: How do you spell that?

Mr. Alexander: P-u-l-l.

The Court: Oh, pull jack.

Mr. Alexander: Same thing as a block and fall, your Honor.

Q. Now, you told your helper to jack the pan up, did you not?

A. No, I didn't tell him. He just started to leave the jack down so he could hook on to it.

[fol. 55] Q. You were in the locomotive with him and inside the fire box, were you not?

A. I was up there, I believe, when we was hooking it together.

Q. You wanted him to jack the pan up, didn't you? That was the purpose?

A. He understood that.

Q. That was the purpose of the operation, wasn't it?

A. Yes, sir.

Q. Now, after this bottom of this ash pan cleared the pit, you took a pit board, did you not, and put across the tracks?

A. Yes, sir.

Q. Would you tell the jury the size of that pit board?

A. I imagine it was about eight inches wide and two inches thick.

Q. And, the purpose of putting that pit board across the pit was a safety precaution, wasn't it?

A. No, sir.

Q. What purpose was there in putting it across there?

A. I had to leave the pan back down to get a new hold with the pull jack.

Q. You told your helper after the pan got up, you told him to let it back down, then?

A. Yes, sir.

Q. So you could get a new hold on it?

The Court: Is that when he put the board across, what do you call it?

Mr. Alexander: Pit board. Yes.

The Court: You said it was so many inches wide and so many inches thick. How long is it?

The Witness: Well, I imagine it was about twelve foot long.

The Court: That is, so it could go across that entire pit and rest on the tracks?

The Witness: Yes, sir.

The Court: And, you put that up after the bottom of the ash pan had cleared the pit?

[fol. 56] The Witness: Up over the top of the pit, yes, sir.

The Court: All right. And, under the ash pan?

The Witness: Yes, sir.

By Mr. Alexander:

Q. Now, you are telling us, then, that at first the pan was jacked up and then it was lowered back down, and then the pit board was put across, is that right?

A. No, sir. As he was putting this pan up the chain got too close up to the pull jack and we couldn't go no farther with it to get it up into position, so we had to leave it back down, and we left it back down on this board then.

Q. To get a new hold on the chain?

A. To get a new hold on the pan, yes, sir.

Q. Now, there were plenty of boards of blocks and boards arou[illegible] where you were performing this work, isn't that right?

A. No, sir.

Q. Maybe we are mixed up on what is "around." But, in and around the roundhouse where you were doing this work were plenty of blocks and boards, isn't that right, for purposes of blocking?

A. No, sir.

Q. Turning to your deposition, again, and I will ask you if I didn't ask you this question and if you didn't give this answer: "Q. There were other pit boards around there, were — not, you could have used? You could have made that wider still if you had desired to do so, could you not? A. They all lengths of board around there."

A. Yes, I said around there, but I understood you to ask me if they were in there, in the roundhouse.

Q. I meant to convey the impression that they were in and around the roundhouse, but now you are saying that there were boards—will you tell the jury where the boards were?

A. They kept all their boards and blocks outside of the roundhouse.

[fol. 57] Q. And, they kept them for the purpose of blocking, isn't that right?

A. I don't know if it was for the purpose of blocking or not. The machinist usually used them for jacking purposes.

Q. Well, for purposes of building scaffolds and making supports and things of that nature, isn't that right?

A. Yes, sir.

Q. Now, after the ash pan cleared the tracks, it was then pulled on up about three or four feet so that the bottom of the pan was about three or four feet above the pit board, is that right?

A. No, I wouldn't say it was up that high above the pit board.

Q. How high would you say it was?

A. Probably a foot and a half or two.

The Court: I wish you gentlemen could agree—you ought to be able to—just how far that would hang down. Now,

if they put the board across, as he says, and the pit is three and a half feet deep, the board is about three and a half feet, if not more, off of the bottom of the floor, if the rail is flush with the top of the pit. If the ash pan itself is three and a half feet deep and at the most there is seven to eight feet from where it would fit hanging down, then there can't be any three or four feet between the top of the ash pan and the place in the locomotive to which it would attach, isn't that right? Am I wrong on that, or does it fit way up into the locomotive?

Mr. Alexander: Our picture, the one that I handed you, shows how far it goes up, your Honor.

The Court: That doesn't show it to me.

Mr. Alexander: May I come forward and show you the picture I have reference to?

The Court: Yes.

(Mr. Alexander approaches the bench.)

[fol. 58] The Court: Evidently there is probably nine or ten feet from where this fits on to the locomotive to the bottom of the pit, if this picture is correct. We will straighten it out as we go along. But, let's bear this in mind, please. There is no use of proceeding with a case of this kind unless the jury understands it, and if the court doesn't understand it that is almost as bad as the jury not understanding it; probably worse.

By Mr. Alexander:

Q. Now, Mr. O'Neill, after you had the ash pan jacked up to the approximate position where you wanted it, you could have put some blocks on top of the pit board within two or three inches of the bottom of the pan, couldn't you?

A. I could have, yes, sir.

Q. But you didn't put them in there, did you?

A. No, sir.

Q. Now, if you had put the blocks under the ash pan, within two or three inches of the bottom, and blocked that up, even though this bolt broke, Mr. O'Neill, the pan would have fallen on the b-ocks, isn't that right?

A. No, sir. My opinion of the way it fell, it come down on the right side. If the pan had struck those blocks on the

right side, probably upset the blocks, too. That's my opinion of it.

Q. That's a conclusion on your part?

A. Yes, sir.

Q. If you had erected these blocks there in a stationary manner, up within two or three inches of the bottom of this pan, and then the bolt broke, the pan would have fallen on the blocks, wouldn't it?

A. The right side of it would have struck the blocks. It come down on an angle.

Q. But it would have fallen, in that event, on the blocks, wouldn't it?

A. I say, the right side of it would have struck the blocks, but whether or not it would have leveled and balance- on those blocks——

Q. That's my question. It would have struck the blocks?

Mr. Dombey: He is answering the question.

[fol. 59] The Court: He claims it is not responsive. He wants an answer.

Q. The pan would have fallen on the blocks if you had put them there?

A. The right side of it would have.

Q. Now, after this pan was pulled up into position, Mr. O'Neill, and you had hold of it with your hands, you were trying to juggle it around to make the holes fit, isn't that right?

A. Yes, sir.

Q. And you were at all times able to move the pan, were you not?

A. Not at all times there, no, sir.

Q. All right, we will go back to your deposition. Now, I will ask you if I didn't ask you this question and if you didn't give this answer: "Q. Now, when you got the pan—when it was jacked up there, you were still able to move it, were you not? A. Yes, sir." Didn't you make that answer to that question?

A. Up there? I don't know what you mean by up there.

Q. You seemed to know what it was at the time the deposition was taken. I asked you that question and you gave that answer?

Mr. Dombey: I don't believe that is a fair examination, your Honor. He has asked one question here. He has asked another question in his deposition.

The Court: It is objectionable as arguing with the witness, but I don't think any harm was done. He got it in, anyway.

Q. I will ask you if I didn't ask you this question: "Q. You were juggling it back and forth to make the holes fit there?" You have this answer: "A. Yes, sir." Isn't that right?

A. Probably did.

The Court: The purpose of that, I suppose, was impeachment?

Mr. Alexander: No, sir.

The Court: Why did you read it?

[fol. 60] Mr. Alexander: The purpose of it was to impeach the——

The Court: I direct your attention to the fact that it doesn't impeach the other question, but it is all right, there is no objection to the question, so go ahead. You can only reach from that deposition when it impeaches.

Mr. Alexander: That is what I read it for.

The Court: If you read the two questions, they are not the same at all.

Mr. Dombey: That's what I said.

The Court: Well, you didn't object to it so they are in.

Q. Now, after the pan was pulled up into place, you got over to the left side of it to try to get the holes to match between the pan and the locomotive, did you not?

A. Between the pan and the ash pan, yes, sir.

The Court: May I ask this question? On the top of the ash pan are there some holes that fit with the other holes, and then you take bolts or something and put them in?

Mr. Alexander: That's right.

The Court: That's what I thought you had in mind. Is that clear to the jury?

Do the bolts go in from the bottom or from the top? Where is the nut, on the bottom or top?

Mr. Alexander: They go in from the side, your Honor.

The Court: If it was possible for me to have it wrong, I would have it wrong.

Is the nut on the outside or the bolt on the outside?

Mr. Alexander: I believe the boilermaker, Mr. O'Neill, could tell that.

The Witness: The bolts are put in from the outside and the nuts on the inside.

The Court: It goes up there and fits up, let us say, like that, and then there is a bolt that fits in around that keeps it solid?

The Witness: Yes, sir.

[fol. 61] The Court: How many of them are around that pan?

The Witness: Well, they are spaced off about six inches apart, and maybe ten or twelve on each side.

By Mr. Alexander:

Q. Now, Mr. O'Neill, you are familiar with the safety rules of the Baltimore and Ohio Railroad, are you not?

A. Yes, sir.

Q. You are familiar with those safety rules that apply to men working in and around the shops such as boilermakers, are you not?

A. Yes, sir.

Q. You are familiar with this safety rule, are you not, Mr. O'Neill: "Standing or walking under a load being hoisted or moved by a crane or other mechanical device is prohibited." You are familiar with that rule?

A. I am familiar with that rule.

Q. Now, this pull jack is a mechanical device, isn't it?

A. Yes.

Q. And an ash pan is a load, isn't it?

A. Yes, sir.

Q. And the ash pan fell on you on June 22, 1948, didn't it?

A. It struck me off to the side.

Mr. Dombey: What is the number of that rule?

Mr. Alexander: 86.

Q. Now, Mr. O'Neill, you returned to work on Friday following this accident on June 22, 1948, didn't you?

A. I didn't return to work, no, sir.

Q. Are you telling the jury that you did not do any work for the Baltimore and Ohio Railroad from June 25, 1948, to September 15, 1948?

A. I didn't do no work from the time of that accident until February 21 of 1949, no, sir.

Q. Now, you walked to work each morning, didn't you?

A. Yes, sir.

Q. And you walked home at the end of each day's work, did you not?

A. Yes, sir.

[fol. 62] Q. You did return to work on February 21, 1949, didn't you?

A. Yes, sir.

Q. And you did your regular work as a boilermaker until March 17, 1949, didn't you?

A. I thought it was March 7.

Q. Well, March 7, all right. Then you were furloughed, were you not, by the railroad?

A. Yes, sir.

Q. Then you were called back on April 4, 1949, were you not?

A. Yes, sir.

Q. And you worked four days, until April 8, and you were furloughed again, isn't that right?

A. Yes, sir.

Q. Now, from the period from April 8, 1949, until February 25, you registered with the United States of America retirement board for unemployment benefits, didn't you?

A. Yes, sir.

Q. And you signed up every seven days for those benefits, didn't you?

A. Yes, sir.

Q. And you certified when you signed up for those benefits, that you were able to work and available for work, didn't you?

A. They didn't ask me that question. I signed those papers. I don't know what was on them.

Q. Now, on September 8, 1949, you were given a notice by the B. & O. Railroad to return to work, were you not?

A. Yes, sir.

Q. And, you didn't return to work, did you?

A. No, sir.

Q. You kept on, though, drawing the unemployment benefits from the United States of America, didn't you?

A. I don't know how long they paid me those.

Q. Well, isn't it a fact that they paid you those benefits up until February 25, 1950?

A. Well, I don't remember what the dates were.

Q. It was after this September 8 when you received this call to come back to work, wasn't it?

A. I don't remember.

[fol. 63] The Court: When did he make application for unemployment compensation, according to you?

Mr. Alexander: For the period from April 8, 1949, after he was furloughed, to February 25, 1950.

The Court: How many weeks can you draw unemployment compensation in Ohio?

Mr. Dombey: No more than $650 in any one fiscal year, the fiscal year beginning July 1 of the year.

By Mr. Alexander:

Q. Now, what doctor have you been to for treatment in the year 1952?

A. None.

Q. What doctor or doctors were you to for treatment in the year 1951? I don't mean for examination purposes, for the purpose of testifying in this case. I mean for treatment.

A. They had me to different doctors for these examinations, and Doctor Wilson suggested—told me he was going to suggest to the Baltimore and Ohio Railroad that they give me therapy treatments.

Q. When was that?

A. I don't remember when the date was, but the time they had me to Harlan Wilson.

Q. Who is your personal physician, Mr. O'Neill?

A. Doctor Griesley.

Q. When were you last to see your personal physician?

A. Been quite a while ago. I don't remember just when.

Q. Approximately when?

A. Maybe a year ago. I don't know.

Q. And when before that?

A. I don't remember when. I don't doctor with him too awful much.

Q. Now, you went to see Doctor Clybourne twice for examinations in connection with this case, did you not?

A. Yes, sir.

Q. What are your present physical activities, Mr. O'Neill?

A. Well, I stay home with my mother and help take care of my house, is about all I get done.

[fol. 64] Q. You help get the meals?

A. Yes, sir.

Q. And you fire the furnace for your mother in the winter time?

A. Yes, sir.

Q. Mow the lawn?

A. No, I have a boy that comes around and mows the lawn. My nephew.

Q. You occasionally mow the lawn, do you not?

A. Yes, sir, I have.

Q. Since June 22, 1948, have you not?

A. Yes, sir.

Q. You get up about seven a. m. in the morning, is that right?

A. Yes, sir, around seven or eight.

Q. You go to bed about eleven or eleven-thirty every night?

A. Some nights around midnight.

Mr. Alexander: That's all.

The Court: Redirect.

Redirect examination.

By Mr. Dombey:

Q. Mr. O'Neill, Mr. Alexander asked you whether you disclosed the fact that you sustained a back injury prior to this accident of 1948, and your answer was that you did not. Why didn't you disclose that to Doctor Clybourne?

The Court: When was this?

Mr. Dombey: The occasion of his first examination, which, I believe, was in August of 1949.

The Court: And, this doctor is the doctor of the defendant company?

Mr. Dombey: No, this is the doctor that examined—whose deposition is to be read here.

The Court: Why didn't you disclose it?

The Witness: He didn't ask me.

Q. Now, on the occasion of this accident, on June 22, 1948, did you disclose to Doctor Pickett, the company doctor, about having a previous back injury?

A. Yes, sir, I told Doctor Pickett about that, that I was injured in Willard, Ohio.

[fol. 65] Q. Did you tell the doctor which part of your back was injured?

A. Yes, sir.

Q. Which part did you tell him was injured?

A. Lower part of my back.

Q. And, did you tell him how long you were off?

A. Yes, sir.

Q. Did you tell him whether or not you received any treatments for it?

A. I told him, yes, sir.

Q. Did you receive any treatments for your back?

A. Yes, sir.

Q. What treatments did you get?

A. Doctor Powell in Attica, Ohio, treated me with some kind of lamp treatment, heat.

Q. Now, after you returned to work following the three or four weeks after that accident, tell the jury what kind of work you did for the railroad?

A. At that time we were overhauling the coal spaces in the Vanderbilt tanks, and I was riveting on those tanks at that time, was driving these 5/8 rivets just day in and day out, every day.

Q. Tell the jury what that work entails, what do you have to do to perform that work?

A. Well, operate a large air hammer, to drive these rivets.

Q. And, do you hold it in your hands?

A. Yes, sir.

Q. Now, Mr. Alexander asked you concerning Rule 86, which says you are not to be under one thing or other when it is being hoisted or moved, or what not. Were you required to be there where you were in order to perform this job?

A. Yes, sir.

Q. Could you have done that job by being outside of the pit?

A. No, sir.

Q. Did anyone tell you to use blocks on this job?

A. No, sir.

Q. Did you ever perform such work in the past involving fastening of pans on to engines?

A. Yes, sir.

[fol. 66] Q. Did you in the past use similar bolts that you used in this case?

A. Yes, sir, the same size.

Mr. Dombey: That's all.

Mr. Alexander: That's all.

The Court: I don't remember whether you said this or whether he said this, something about the bolt breaking.

Mr. Dombey: He said it.

The Court: How do you know the bolt broke?

The Witness: Mr. Connelly, the master mechanic, had me up in his office and showed it to me.

The Court: Did you do this job in the usual way that you have done this job for years?

The Witness: Yes, sir.

The Court: And that others do it?

The Witness: Yes, sir.

The Court: All right.

Mr. Dombey: May I ask one more question of the witness?

By Mr. Dombey:

Q. Is that the usual bolt you use on that kind of a job?

A. Yes, sir.

The Court: The same one you used before, the same size and everything?

The Witness: Yes, sir.

Mr. Dombey: Doctor Ridgway.

JOSEPH A. RIDGEWAY, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Dombey:

Q. Will you state your name, please?

A. Joseph A. Ridgeway, M.D.

Q. What is your profession or vocation?

A. Orthopedic surgeon.

[fol. 67] Q. Is that a specialized field in the practice of medicine?

A. It is, sir.

Q. What does that field encompass?

A. That branch of surgery which deals with bones, joints and associated structures to prevent deformities or disabilities and to correct them if they occur.

Q. Now, Doctor, will you kindly relate briefly to the jury what education and experience you have had to fit you for your service?

A. I graduated from Ohio State in 1938 in the school of medicine. I served one year interneship at Grant Hospital, Columbus, Ohio, one year in surgical residency at Grant Hospital, Columbus, three years at Johns Hopkins, resident in orthopedic surgery, five years in the U. S. Army.

Q. Where are your offices located?

A. 327 East State street, Columbus.

Q. Are you associated with any doctor?

A. I am, sir.

Q. Who is he?

A. Doctor C. C. Shinbach.

Q. All right. Doctor, did you at my request examine a Francis O'Neill last Friday?

A. I did, sir.

Q. Where did that examination take place?

A. At my office, 327 East State street.

Q. What did the examination consist of, Doctor?

A. Examination consisted of taking the patient's chief complaints, physical examination of his back, including X-rays of the dorsal region of the spine.

Q. All right, Doctor, will you kindly tell the jury what

your examination disclosed with reference to the condition of his back?

The Court: May I ask when this was?

Mr. Dombey: Last Friday afternoon, your Honor.

The Witness: May 9.

The Court: Was that the first time you have seen this man?

[fol. 68] The Witness: Yes, sir.

The Court: All right.

A. Do you wish to have the chief complaints?

Q. Yes, please.

A. The patient's chief complaints at the time I saw him at the office were related chiefly to his back. He stated that the back hurts all the time; that long walking causes sharp pain in the back; twisting to the right causes pain in the back; and he does no lifting. Bending does not affect the back. Coughing and sneezing do not produce pain in the back and he did not complain of pain or numbness in the legs. He states that weather conditions had no effect. On the physical examination we found, or I found, an adult white male who walked erect. His pupils were regular and equal and reacted to light and accommodation.

The Court: Go slower on this. His pupils what?

The Witness: Were regular and equal and reacted to light and accommodation. At the time, his teeth were in need of dental care. His throat was negative. His reflexes about the knee and ankle were normal.

Examination of his back in erect position, that is, when he was standing—he pointed from the mid dorsal region and along the inferior margin of the scapula to the posterior axillary line as the area of complaint.

The Court: Now, describe the spine. It is in four parts, isn't it?

The Witness: The spine itself has a cervical spine, a dorsal spine, a lumbar spine.

The Court: Then there is the lower region.

The Witness: That's the pelvis.

The Court: Just give the jury—remember that this is old stuff to you, especially if you came from Ohio State, but,

how many parts in the spine and how many in that upper [fol. 69] group and then down below, so that they can get an idea of it.

The Witness: All right, sir. In the cervical spine we have seven cervical vertebra.

The Court: From the back of the neck down?

The Witness: From the base of the skull to the lower vertebra of the neck there are seven.

The Court: Seven vertebra.

The Witness: In some people we will find eight. As a rule there are seven.

The next is the dorsal spine and there are twelve.

The Court: Now, this was in the dorsal spine, is that right?

The Witness: Yes, sir.

The Court: Which would mean, in other words, about the middle of the back?

The Witness: Middle of the back? Well, it is a little higher than the middle because he pointed from the mid dorsal region, which is the level approximately from the sixth dorsal spine, which is between the shoulder blades and approximately one inch above the lower border of the shoulder blade.

The Court: Now, what is the next one? This is the dorsal.

The Witness: Then the next is the lumbar spine, in which there are usually five. Sometimes we find six, or sometimes we find a transitional vertebra which is——

The Court: All right. Never mind any of those exceptions.

By Mr. Dombey:

Q. All right, Doctor, so you have already explained the location of the mid dorsal column of the vertebra. Now, confine your testimony and what your examination dis- [fol. 70] closed with respect to that.

A. He pointed from the mid dorsal region, which is the region from the sixth to the eighth vertebra. Then pointed along the inferior margin of the scapula, which is the shoulder blade, to the posterior axillary line, which is the fold where the side of the body—we divide it up into three lines, where it meets the front of the arm pit and the back of the arm pit. Now, his pain was referred from the middle of

the back to the line extending down from the posterior portion of the arm pit.

Q. Now, Doctor, did you elicit any reaction to palpation in that area following his complaint, Doctor?

A. I attempted to, sir. I found that the muscles in that region reacted normally. There was no spasm of the muscles, that the muscles attached to the shoulder girdle or to the shoulder blade were not spastic, but there was tenderness over that region and over the spinous processes of the sixth, seventh, eighth and ninth dorsal vertebrae.

The Court: Could you tell that or was that subjective?

The Witness: That is a subjective complaint.

The Court: In other words, that's what he said was tender?

The Witness: That's right, sir.

Q. Pardon me, so that I understand your answer. That was the area of the complaint and that's where you made the examination by palpation?

A. That's right, sir.

Q. And those were your findings as a result of your examination?

A. That's part of them.

The Court: Just a minute. Let's not misunderstand that. You can't, by feeling of it, palpation or anything else, tell whether or not it is tender there? I don't say you can or can't. Can you?

The Witness: Yes, sir.

The Court: You can?

[fol. 71] The Witness: Yes, sir.

The Court: So, you are able to tell that not only did he say it was tender, but you found that it was tender?

The Witness: No, I didn't say that.

The Court: That is what I want to know.

The Witness: But he stated that he was tender when I palpated.

The Court: And, that's what you have to go by?

The Witness: That's right, sir.

The Court: All right.

The Witness: Motions of the shoulders were normal, forward bending of the back was normal, backward bend-

ing is restricted, lateral bending and rotation were normal. He was tender to pressure over the sixth and seventh ribs to the posterior axillary line from the mid line, which is from the mid line of the back to the line dropping from the posterior line of the shoulder, arm pit.

Now, on compression of the chest from the lateral side and also anteriorly posteriorly, that is, from front to back, there was complaint of pain, which was a pain that extended through that had no superficial radation. His chest measurements were within approximately the normal range of motion.

Q. Now, Doctor, did you cause any X-rays to be taken of his dorsal spine?

A. I did, sir.

Q. Do you have those X-rays with you?

A. I do, sir.

Mr. Dombey: Mark these Plaintiff's Exhibits 1 and 2.

(Plaintiff's Exhibits 1 and 2 were marked for identification.)

Q. Now, Doctor, I will hand you what for purposes of identification has been marked as Plaintiff's Exhibit 1, and ask you what that is?

A. This is an anterior posterior view of the patient's dorsal spine. It extends from the first dorsal spine to the [fol. 72] twelfth. We start counting up, I think it is the second and just the lower border of the first. As we look at this film we can see that there is a decrease in the width of this vertebra, which is the eighth dorsal vertebra. The ribs themselves appear normal.

This was not taken for heart shadows, but the heart shadows themselves do appear to be in the normal area.

Q. Is that all that that X-ray disclosed with reference to the dorsal spine?

A. Yes, sir.

The Court: Before you go on with that, Doctor, you say it was wider?

The Witness: No, sir, it was narrower.

The Court: Point to the one you mean.

The Witness: This one right here.

The Court: You say that is narrower. Does that indicate anything to you?

The Witness: Yes, sir; that is only one view. We never make an impression on one view X-ray.

The Court: You are looking at the back, now?

The Witness: That's looking at the back. This X-ray is taken with him lying on his back, from the abdomen through.

The Court: When you see that, something narrow there, does that alert you to further investigation?

The Witness: Yes, sir. We don't make an impression on one film.

By Mr. Dombey:

Q. Now, Doctor, I will hand you what has been marked for identification as Plaintiff's Exhibit No. 2 and ask you what that is?

A. This is a lateral view of the patient's dorsal spine, and on this X-ray we see a narrowing of the body of the eighth dorsal spine, which is slightly less than half of the width of the body above and the body below, which means that there has been a compression of this vertebra. It has [fol. 73] been narrowed or wedged. We see in the back part that it is approximately normal in width, and the front or anterior portion it is narrowed.

Now, we can see that the curve of the spine above this region is increased. You will notice how straight he is from the compressed area downward. From the compressed area upward the patient tends to bend forward. Now, on his examination I didn't pick up the fact that he had this, and a lot of times this will be evidenced by a round shoulder or a hunchbacked condition, but you can see that the curvature has increased above this compression vertebra.

Q. All right, Doctor, I will ask you what if anything you found with reference to the sixth dorsal vertebra?

A. The sixth dorsal vertebra on a routine examination may be easily missed. There is a slight, a very mild compression of the sixth. That is, it is slightly narrower than the one above and the one below.

Q. Now, Doctor, so that your X-ray study of Mr. O'Neill disclosed a compression fracture of both the eighth and sixth dorsal vertebra?

Mr. Alexander: Object. He didn't so testify, your Honor.
Mr. Dombey: I don't know what he has stated.
Mr. Alexander: He said a narrowing.
The Court: Do you care to reframe the question?
Mr. Dombey: I will withdraw that question.

Q. Isn't that type of an injury commonly known as a compression fracture of the vertebra?

A. This is considered to be a compression fracture of the vertebra.

Q. So, I repeat again, that your X-ray study of the dorsal spine of Mr. O'Neill disclosed a compression fracture of both the eighth and sixth dorsal vertebra?

A. Yes, sir.

Q. Now, what if any other changes did you note or could [fol. 74] you note from your examination of the dorsal spine as compared to the other portion of the spine?

A. That the inferior margin and also at the superior margin of the eighth dorsal spine there is a small or a mild degree of arthritic change present.

Q. Now, do you have an opinion, Doctor, as to whether or not the arthritic change that you noted there, whether it is traumatic or not?

A. Well, due to the fact there is no evidence of any of the other vertebra shown, and this is a region of attachment of ligaments and is in direct relation to the region of compression, this appears to be a traumatic type change.

The Court: In other words, it came from a blow of some kind?

The Witness: That is right, sir.

Q. Now, Doctor, what if any examination did you make of the intercostal areas or channels there between the, say, sixth and eighth dorsal vertebrae or possibly between the seventh and ninth?

A. My examination at that time consisted of palpation along the margins of the ribs, and that is when the patient states to me that there was tenderness on palpation.

I also questioned him at the time, before I had seen the X-rays, about the presence of any blisters along that line. It so often happens that when we have an intercostal neuralgia or neuritis we get blister formation, scab formation as a result of the nerve irritation. Mr. O'Neill stated

that at one time he did have some breaking out there but he wasn't sure whether it was due to adhesive tape that he had been wearing or whether it came on spontaneous, and due to that fact I did not go any further into that question.

Q. Now, Doctor, assuming that Mr. O'Neill was a railroader, a boiler worker, which entails hard lifting and at [fol. 75] times working with his hands over his head. Do you have an opinion as to the amount of disability, if any, that he has by reason of the condition to which you have testified for railroad work?

A. I do have, sir.

Q. What is your opinion, Doctor?

A. My opinion at the time of the examination, that Mr. O'Neill was disabled to a moderate degree for that type of work which he had been doing, requiring him to do bending, lifting and considerable use of his arms.

Q. Now, what do you consider a moderate degree, Doctor, within what figure does that place it?

A. I consider that to be in a range of disability of approximately forty to sixty per cent.

Mr. Dombey: That is all, Doctor.

The Court: After what you saw and what he told you, would you have reason to believe that he was tender there?

The Witness: Yes, sir.

The Court: That is, the objective, as far as you could see, bore out the subjective?

The Witness: The objective finding of the compression does bear out this subjective finding.

The Court: Did you ever ask him at any time how long a duration this was, or, could you tell by looking at it whether this had come on in the last two or three years or ten years ago?

The Witness: No, sir, I could not.

The Court: You would have to go by what he told you?

The Witness: I would have to go by what the patient states.

Mr. Alexander: No questions, your Honor.

Mr. Dombey: We would like to read Doctor Clybourne's deposition.

Mr. Alexander: We move that all of Doctor Ridgeway's

testimony be stricken for the reason that there was no [fol. 76] testimony offered by Doctor Ridgeway that the conditions he found existing on the occasion of his examination of Francis O'Neill on Friday, May 9, 1952, had any connection with Mr. O'Neill's accident on June 22, 1948.

The Court: May it appear on the record that this case was set for tomorrow, that at the request of the court we started today. The court will be very lenient with the introduction of evidence that might appear now to be out of order. Although there may be some merit to the motion, nevertheless the court feels that he should permit the plaintiff to proceed to determine whether or not he has connected the condition with the claims of the plaintiff. So, I deny the motion but without prejudice.

Mr. Dombey: So the record is clear, opposing counsel were notified and consented to placing Doctor Ridgeway out of order.

Mr. Dombey: Deposition of Doctor Clybourne.

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Harold E. Clybourne, called as a witness, being duly cautioned and sworn, as hereinafter certified, deposes and says as follows:

Examined.

By Mr. Dombey:

Q. Will you state your name, please?
A. Harold E. Clybourne.
Q. What is your profession or vocation, Doctor?
A. I am an orthopedic and traumatic surgeon.
Q. Where are your offices located, Doctor?
A. 117 West Third avenue.
Q. What does the practice of orthopedic surgery encompass, Doctor?
A. That encompasses—that takes care of injuries, pathological conditions, and the bones, joints and muscles.
Q. And how long have you been in the practice, Doctor?
A. Since 1923.
[fol. 77] Q. Will you kindly give us, briefly, the training and education that you had for your specialization?

A. My original training was as an osteopathic physician. I graduated from Des Moines Still College of Osteopathy; I externed at Des Moines General Hospital, and then I worked under various orthopedic men, such as Dr. John M. Hiss here in Columbus, Dr. H. M. Robinson, a railroad surgeon at Kenosha, Wisconsin, and then I have had further training at Cook County Hospital in Chicago; Los Angeles County Hospital, in Los Angeles; Lehey Clinic in Boston, and then I have had various specialty courses in the country.

Q. Doctor, at the time of the taking of this deposition, what is your condition?

A. Well, I am hospitalized with a virus infection.

Q. And you are confined to which hospital?

A. Doctors Hospital.

Q. Are you in any way connected with this hospital?

A. Yes, I am chairman of the department of orthopedic and traumatic surgery here.

Q. Doctor, did you have occasion to examine a Francis O'Neill any time in the past?

A. I did.

Q. When did the original examination take place?

A. The first examination on him was 7-27-49.

Q. And where did the examination take place?

A. In the out-patient department at Doctors Hospital.

Q. Tell me, Doctor, what the examination consisted of and what your findings were at that time?

A. Well, the examination consisted of a history of the patient in which we took the chief complaint, and then the onset and course of his condition. Sorry if I can't talk any plainer but I am—and then the orthopedic examination in which we did the various orthopedic tests to check his reflexes, and so forth, and then a general run over of his [fol. 78] general systematic condition, which included the head, the throat, the respiratory cardiovascular gastro-intestinal urinary, and genito-urinary, and then an X-ray examination.

Q. I will ask you whether or not, Doctor, you examined the condition of his spine?

A. I did.

Q. What did your examination disclose with reference to the spine?

A. On his spine we found that he had a splinting of the entire spine on motion, with pain developing in the mid-dorsal area, and following the course the intercostal nerves from this area on the right side. X-ray examination of the spine showed a compression fracture of the eighth dorsal vertebra and palpatory examination showed that the spinus processes of the sixth, seventh, and eighth dorsal spines were sensitive to palpation and that they were not moving on side bending or torsion, and we also found that there was a fixation of the sixth, seventh, and eighth ribs on the right side.

Q. Now, Doctor, in connection with the compression fracture of the eighth dorsal vertebra, did you find any other involvement in connection with that vertebra?

Mr. Alexander: I object, he's already answered the question and the question is leading.

The Court: He may answer.

A. The only thing that I found in there was that he did have this restriction of motion and a sensitiveness in that area.

Q. Well, I will ask you——

Mr. Alexander: Move that the answer be stricken.

The Court: Overruled.

Q. (By Mr. Dombey) I will ask you whether or not there was any intercostal nerve involvement in connection with that compression fracture—just a minute, just let me finish the question, please.

Mr. Alexander: All right.

[fol. 79] Q. —Of the eighth dorsal vertebra.

Mr. Alexander: Object. The question is leading. The doctor has already answered the question.

The Court: He may answer.

The Witness: In my report here, I state, No. 1, a compression fracture of the body of the eighth dorsal vertebra with the eighth intercostal nerve involvement on the right side.

Mr. Alexander: Move that the answer be stricken.

The Court: Overruled.

Q. (Mr. Dombey) Will you kindly explain to us, Doctor, what association there is between the compression fracture and this nerve involvement?

Mr. Alexander: I again object, as the question is leading.

The Court: He may answer.

The Witness: The intercostal nerves come out between through an opening between the two vertebra which is partly formed by the arthrodias, which are the parts of the joints that the vertebrae move on and in injury to a vertebra such as this type of injury, the forward part of the body is compressed down and that causes a slight buckling of the joint at this area, which, in turn, decreases the lumen or opening of the intervertebral foramen and that, in turn, sets up an irritation to the structures coming through that foramen and it is a very common occurrence on a compression fracture.

Mr. Alexander: I object to it or move that the answer be stricken and that, Mr. Dombey, the doctor has made an examination. I am objecting to your leading the doctor. Let him state what he found.

Mr. Dombey: Are you finished?

Mr. Alexander: Yes.

The Court: It may stand. Of course, some day I am hoping that these doctors will talk so that the rest of us [fol. 80] know what they are talking about. But, it may stand. I know that all the jury doesn't get everything he said, but nevertheless it is in there.

Q. (By Mr. Dombey) Now, Doctor, will you kindly tell us what, if any, effect—no, strike that out—I will ask you whether or not the nerve involvement to which you have testified is in any way disabling?

Mr. Alexander: I object, the doctor has answered; he stated what his physical findings were. Now, you are continually trying to lead him, Mr. Dombey, and I am objecting.

Q. (By Mr. Dombey) Will you answer the question, Doctor?

The Court: Well, it borders on the suggestive, but I don't think it is leading. It does border on the suggestive, but I am going to let the answer stand.

A. In my report of August 1, I stated "This patient's pain is coming from a"——

Q. No, no, Doctor, please don't refer to what you said. Will you kindly answer my question? Will you read the question to the doctor?

(Reporter read the question.)

The Witness: Intercostal nerve pain is aggravated by any type of motion involving that particular area and it will give you a certain amount of pain in there, but I would not say that it is completely disabling. The patient develops a protective splinting attitude for that particular thing, but—and over a long period of time it upsets their nervous system, but it is not disabling.

Q. In other words, Doctor, you would say then, that it is more painful than it is disabling?

A. Yes.

The Court: That question would have been objectionable.

Mr. Alexander: I got tired, your Honor.

[fol. 81] Q. Now, Doctor, I believe you testified that on the occasion of that examination you found spondylitis of the spine extending from the mid-dorsal down through the entire lumbar area. What, if any—what is the character of that type of a condition?

Mr. Alexander: I object to the question. I do not believe the doctor testified to any spondylitis.

The Court: Sustained.

Mr. Dombey: Exception.

The Court: He hasn't even mentioned anything like that. I haven't heard anything up to this time about it.

Mr. Dombey: Then there are several questions following that.

The Court: What did he call that?

Mr. Dombey: Spondylitis.

The Court: How do you spell it?

Mr. Dombey: S-p-o-n-d-y-l-i-t-i-s.

The Court: That's the first time we have heard the word.

Mr. Dombey: It was heard in his report.

The Court: I sustain the objection.

Mr. Dombey: We want to proffer the answer.

(Proffering.)

Q. (By Mr. Dombey) Go ahead.

A. This patient has a—has developed an inflammatory reaction in the area of the injury and has also developed a resulting splinting reaction down through the lower back as a protective mechanism to this back, and they keep that up over a period of time until they really stiffen up the whole spine more from a fear mechanism than anything else.

Mr. Dombey: May I proffer the rest of the questions and answers relating to spondylitis?

The Court: Yes.

Q. (By Mr. Dombey) Now, what do you mean by spondylitis, Doctor?

[fol. 82] The Court: I don't know whether the rest of them are out or not.

Mr. Dombey: I will read them. I don't think the questions can be prejudicial.

The Court: Let the court see them here.

You see, the first question is unquestionably objectionable because you are the one that tells him what he said. Has he at any time testified that he found spondylitis of the spine?

Mr. Dombey: I am not sure that he used that word, your Honor.

The Court: You must appreciate that the court——

Mr. Dombey: I know what the court has in mind. I just feel that it is of sufficient importance that I don't want to exclude it from the record.

The Court: Did this doctor on August 1, 1949, make a report?

Mr. Dombey: Which opposing counsel got a copy of.

The Court: And you got a copy of it?

Mr. Ebinger: Yes, sir.

The Court: I think you can begin there.

Mr. Dombey: Where is that?

The Court: On page 10. "Now, Doctor, you stated in your report of August 1——"

Mr. Dombey: That's right, we have given it to them voluntarily.

Mr. Alexander: Are you saying that the report is evidence?

*The Court*: *I think* it is something you have been furnished with. I think he can question on it.

Mr. Alexander: This doctor is a witness and it was up to Mr. Dombey to elicit the information from him, not to tell him what the information was.

[fol. 83] The Court: Well, you have got that right there. You could lead up to it with a lot of other questions. "Did you not on such and such a day make an examination?" "Did you not give a copy of it to opposing counsel?" "Is this a copy of that given to opposing counsel?"

Do you see how you eventually get the same thing?

Mr. Dombey: It would be interesting to see how——

Mr. Alexander: The questions were improper.

The Court: Technically yes, but you had it and if he had made a misstatement you certainly would have drawn his attention to it.

Mr. Alexander: That is why we objected.

Mr. Dombey: It would be interesting to see what use they made of that report in this deposition. That was given to them voluntarily.

The Court: To approach this properly, to get away from the technical objection, you would have had to bring out all about this report that he made.

Page 10, in the middle of the page.

Q. (By Mr. Dombey) Now, Doctor, you stated in your report of August 1, 1949, that the sixth, seventh, and eighth dorsal spinus processes were sensitive to palpation and percussion. What, if any, association was there between that condition and the injury to the eighth dorsal vertebra?

The Court: The objection is overruled.

Your objection to his speech is overruled, too.

(Mr. Dombey reading)

The Witness: Well, the soreness of the spinus processes indicates an inflammatory reaction to the vertebra that the spinus processes are attached to, and with a history of injury, we always interpret that as being the result of tra*mua*. If he had no history of injury, we would begin to [fol. 84] question about infection or pathological conditions of some kind.

Q. Now, Doctor, in addition to the sensitiveness of the processes of the sixth and seventh and eighth dorsal vertebrae, I will ask you whether or not that had any effect upon the patient's ability to move those vertebrae in the use of his back?

A. Well, they were not moving.

Q. Now, what, if anything, do you attribute that to, Doctor?

A. Well, that is a—whenever we find a vertebra of that type that is not moving, we know that we have an inflammatory reaction there, traumatic in character, unless we do have indications of a pathological condition.

The Court: Objection overruled.

Q. All right. Now, I believe you also testified here this morning that there was a fixation of the sixth and seventh and eighth ribs on the right side?

Mr. Alexander: I object. The question is leading.

The Court: Overruled.

Q. Now, Doctor, you have testified that there was a fixation of the sixth and seventh and eighth ribs on the right side. What, if any, effect did that condition have upon the patient?

The Court: The objection is overruled.

The Witness: The ribs all arise posteriorly, each rib from a vertebra and the upper ribs fasten in front to the breastbone and on breathing or, say, inhalation, the ribs rise and in a bucket bail action and give the lungs room to expand, and whenever there is injury to a vertebra such as a compression fracture, in which we get an angulation of this particular portion of the spine, the ribs cannot rise and they have—it's just like they have a feeling like a tight band around there and the nerves which runs between the ribs are irritated and they develop an intercostal neuritis from that area, too.

[fol. 85] Mr. Alexander: Move that the answer be stricken. The answer is not responsive to the question and not confined to the plaintiff, O'Neill.

The Court: Overruled.

Q. Now, Doctor, what, if any, disability is there as a result of the fixation of those ribs?

A. They get—when they start to move, they'll get a sharp stabbing pain along the course of that nerve as the stress is thrown in that particular area which ordinarily should be supple.

Mr. Alexander: Wait just a minute. Move that the answer be stricken; not confined to this patient.

The Court: Overruled.

Q. Now, Doctor, assuming that Mr. O'Neill was a railroader, and in the course of his employment he was required to do heavy work from time to time, I'll ask you whether or not at that time you formed an opinion as to the extent of his disability for that type of work?

A. The particular area in which he is injured is involved every time the man raises his arms. That straightens out the dorsal curve and any involvement of motion in that area will give him considerable pain and with a—well, I think that's it.

The Court: They objected and it is overrued.

Q. Doctor Clybourne, did that complete your examination on the occasion of August 1, 1949?

A. That did, yes.

Q. I will ask you if you had occasion to examine Mr. O'Neill any time subsequent to that date?

A. Yes, I examined him 8-1-50 at Doctors Hospital.

Q. All right. Now, will you tell us, Doctor, what your examination disclosed at that time with reference to the eighth dorsal vertebra?

A. We showed the anterior wedging of the eighth dorsal vertebral body and it showed that the fracture was well healed at the present time—at the time of the examination.

[fol. 86] Q. What is the effect of the edging of the eighth dorsal vertebra body?

A. Well, that leaves a slightly weakened area in the spine with a tendency towards some slight buckling at that particular joint in the spine.

Q. Now, Doctor, will you kindly tell us briefly, what, if any, difference you noted in his condition with respect to

his spine between the dates of August 1, 1949 and August 7, 1950?

A. Well, the first time we examined him, we found a slight intercostal neuritis on the right side in the area of the eighth. This time he had a very marked intercostal neuritis on the right side involving the seventh, eighth, and ninth intercostal nerves and we also found that he had a—the spondylitis had extended not only down the spine but it had gone up the spine into the lower cervical or neck area; his whole spine was sore this time, wherein, the upper part had not bothered him before.

Q. What, if anything, do you attribute that change to, Doctor?

A. Well, we just simply felt that it was a development of a traumatic arthritis which follows spinal injury of this type.

Q. All right. Then that's the condition that was present on the occasion of your first examination?

A. Yes, the upper dorsal and lower cervical.

Q. Now, what did you find with reference to the sixth, seventh, and eighth ribs on the right side?

A. Well, they were restricted. The rest of our findings were essentially the same.

Q. Were the same? Now, Doctor, did you at that time attempt to evaluate his disability for railroad work?

A. Well, at that time, I told him I did not think he would ever be able to return to railroad work, because any lifting, bending, or throwing, any type of torsion, or strain, would aggravate his condition.

[fol. 87] Q. Now, Doctor, did you have occasion to examine him any time after August the 7th, 1950?

A. Yes, I examined him 5-6-52.

Q. All right, and tell us, what, if any, changes you noted in his condition from the previous examination?

A. Our findings were essentially the same with the exception that his intercostal neuritis had quieted down.

Q. And——

A. I also—because of the spinal condition—ran the sedimentation rate on him, which shows whether he had an infective arthritis or not, and found that he was in the high

normal reading for sed rate, and which would seem to indicate that it was traumatic.

Q. By that you mean, Doctor, that the development of the arthritis was due to the injury?

A. Injury, rather than infectious.

Q. All right. Now, Doctor, did you on that occasion attempt to evaluate his disability for railroad work?

A. Yes, I told him again that I thought that he should try to find some other type of work in which he would not lift or twist, that I felt any lifting or twisting would aggravate it, and I also told him I felt he should be wearing a brace on his back.

Q. And what type of a brace would that be?

A. Well, he should wear a Taylor brace which would run up with straps around his shoulder to stop any play in that particular area.

Q. Doctor, did you at that time attempt to evaluate his disability for all types of manual work?

Mr. Alexander: I object. He's already answered that question.

The Court: He may answer.

The Witness: In talking it over with Dr. Hutchinson, my resident, in discussing this case, I told him that I thought that as far as railroad work, the man was completely out.

[fol. 88] Q. Now, Doctor——

A. And that he had——

Mr. Alexander: I object, and move that the answer be stricken.

Mr. Dombey: We agreed that that answer was not responsive and moved that it go out.

Q. My question is, did you, on the occasion of your last examination, form an opinion as to his disability or amount of his disability for all types of manual work?

Mr. Alexander: Object to that queston.

The Court: He may answer.

The Witness: Yes, I feel this man has about a fifty per cent permanent disability on the spine.

Q. (Mr. Dombey) All right, Doctor, you are testifying here from the hospital bed, are you not?

A. I am.

Q. And do you have a record of the charts that you made in this case, or not?

A. No, I haven't.

Q. All right. I believe that is all. Oh, incidentally, Doctor, all of these examinations were made at my request?

A. Yes.

Q. I believe I neglected to ask you this question: Assuming that Mr. O'Neill on June the 22nd, 1948, while engaged in his employment with the B. & O. Railroad was standing in a crouched position in a pit with his hands elevated to guide an ash pan which gave way striking Mr. O'Neill about the face and body, wedging him against the pit in the portion of the engine, I will ask you whether or not the condition that you found on the occasion of your first examination with respect to the condition of the eighth dorsal vertebra whether or not that condition was in any way associated with the injury of the—on June the 22nd, 1948, as related by you?

Mr. Alexander: Object to the question. It's not containing the true facts.

[fol. 89] The Court: You object that it doesn't contain the true facts. What does it eliminate? I mean are you talking on the theory that a hypothetical question should assume all the facts?

Mr. Alexander: Yes.

The Court: What does it fail to state? Do you want to approach the bench on that?

Mr. Alexander: May I, please?

The Court: All right.

(Discussion at the bench.)

The Court: That is the only objection. The court feels that it does sufficiently cover the facts. It might have been more minute and it could have been more complete, but I think that it substantially covers the ground. You may answer.

The Witness: Yes, the type of injury he received is the type that caused this compression fracture.

Mr. Dombey: That is all, Doctor.

The Court: I think we can take a recess here, ladies and gentlemen. On the cross examination, if you don't mind,

one of you take the stand and the other ask the questions. We will be able to follow it better.

(Recess.)

The Court: If you have any objections I will permit you to make objections at any time on anything. I am interested in getting the facts and the law, not on technicalities.

Mr. Alexander: Note our objection to the court's overruling our objections to Doctor Clybourne's testimony.

The Court: The court ruled out spondylitis, you understand, because there was no evidence that the doctor had ever, either by report to the other side or in his testimony, mentioned anything about it. That came out of a clear sky to you just as it did to me and it was not in answer [fol. 90] to a question. It was in answer to a suggestion by counsel, if you will remember. That is why you forget you ever heard anything about it up to now.

Cross-examination.

By Mr. Alexander:

Q. Doctor, in your examination of August the 1st, 1949, you found that Mr. O'Neill did not have any chest pains, did you not?

A. Yes.

Q. In your examination of August 1, 1949, you found that his pulse was normal, did you not?

A. Pulse was 84, yes.

Q. In your examination of August 1, 1949, you found that his heart was—seemed to be regular with no murmurs, isn't that right?

A. Yes.

Q. And in this same examination, you found that the position and size of the heart seemed to be normal, did you not?

A. Yes.

Q. In your examination of 8-1-49, you found that Mr. O'Neill had a good appetite, didn't you?

A. Yes.

Q. In this same examination you found that food caused no allergies, but that cabbage caused some flatulency, did you not?

A. Yes.

Q. And flatulency, I believe, is a gastric forming on the stomach?

A. Yes.

Q. And that's a common occurrence in a lot of people, isn't it, Doctor?

A. Yes.

Q. In this same examination of August 1, 1949, you found that Mr. O'Neill gave no history of constipation, did you not?

A. That is right.

Q. Abnormal bowel movements, right?

A. That's right.

Q. In this same examination, on August 1, 1949, you stated that Mr. O'Neill had diarrhea every three or four months when he consumed a large amount of beer, is that right?

A. Yes.

[fol. 91] Q. Now, Doctor, you have testified that you made a second examination of Mr. O'Neill on August 7, 1950, is that right?

A. No, August 1, 1950.

Mr. Dombey: August 7.

Q. (Mr. Alexander) I believe your report is dated——

A. It was dated August 7.

Q. But it was really August 1 that you made the examination?

A. Yes.

Q. Now, in this examination of August 1, 1950, you examined Mr. O'Neill's eyes and found that there was no trouble, did you not?

A. That's right, he had a scar where he had a laceration in a lid.

Q. That's right, and you found that his hearing was normal in this examination, did you not?

A. Yes, his general physical condition was good throughout.

Q. Yes, and you found in his examination of August 7, 1950, that there was no evidence of any post-nasal drainage or obstruction of the nose, is that right?

A. That is right.

Q. And the same situation was true with his throat, it was in a normal condition, isn't that right?

A. Yes.

Q. Now, in this examination of August 7, 1950, of Mr. O'Neill, you found that he had no chest pain again, did you not?

A. No chest pain, no, sir, no manifestation, yes, that's right.

Q. And that was my next question, Doctor, you found on August 7, 1950, that Mr. O'Neill had no cerebral manifestations—your answer is yes to that?

A. Yes.

Q. And in this examination of August 7, 1950, you again found that Mr. O'Neill had a good appetite and was eating three regular meals a day, is that right?

A. That is right.

Q. And you found that his appetite was good, did you not?

A. Yes, that's what he states.

[fol. 92] Q. And you found in this examination of August 7, 1950, that Mr. O'Neill had no abdominal pains, either before or after meals, isn't that right?

A. That is right, yes.

Q. You again found in this examination of August 7, 1950, or August 1, 1950, when you examined Mr. O'Neill that he had normal bowel movements?

A. Yes.

Q. And that he had no smarting or burning on urination, isn't that right?

A. That is right.

Q. And on this examination of August 1, 1950, you found as a result of your examination on Mr. O'Neill's neuro-muscular system, that there was no evidence of joint pain, isn't that right?

A. That's right. Now, that involves——

Mr. Dombey: Now, just a minute. Let him answer the question. Just a minute, Mr. Alexander, please.

The Witness: That does not involve the area of examination or chief complaint.

Q. It involves the neuro-muscular system that you refer to in your examination?

A. But that does not involve the area of chief complaint.

Q. All right, but it is the neuro-muscular system, isn't it?

A. Yes.

Q. All right. Now, Doctor, in this examination of August 7 or August 1, 1950, you found that there were no other manifestations connected with the neuro-muscular system, isn't that right?

A. That is right.

Q. All right. Doctor, what is the case history or a history?

A. A history is the patient's story of his condition. We start in with that and a case history is divided up into: Chief complaint, onset and course, previous history, which brings in their childhood diseases, anything which might pertain to a general systemic involvement of any type and then the next step is your inventory of symptoms in which you check and see if they have any particular thing wrong [fol. 93] with them, with any portion of the body, and then after that you add your examination to that.

Q. Well, now, Doctor, a case history is very important to a doctor in making a diagnosis, isn't it?

A. It is, yes.

Q. It is very important. A case history is almost as important as an X-ray or any other test that you might run, isn't it?

A. No, no, it is not, but it is a valuable adjunct to the working up of the case. In this particular, a good example would be, in this particular case, if this man had complained of neuro-muscular pain in his joints, in his fingers or wrists, we would immediately suspect a rheumatoid arthritis and we would know that that particular rheumatoid arthritic would aggravate any area of injury.

Q. Well, now——

Mr. Dombey: Just a minute. Are you finished with your answer?

The Witness: Yes.

Q. (By Mr. Alexander) Doctor, if a patient gives a doctor an inaccurate history or an incorrect history, the doctor's diagnosis is apt to be inaccurate, is it not so?

A. To a certain degree, but after you have been taking

case histories for twenty-five years you have a pretty good idea, because they dovetail, and we ask leading questions, and then we'll come back and come at them from a different angle, and if we suspect the least bit that a patient is malingering or anything of that type——

Q. Well, Doctor, if I come into your office and I give you a case history of having hurt my toe on a certain date and you examine the toe and see that it is hurt, that then you make a diagnosis that the toe was hurt from the date that I gave you, isn't that right?

A. Yes. But then on the other hand, if I take an X-ray of that toe and should happen to find that my X-ray findings don't coincide with that date, in our course of our conversation I might come at you from a different angle, about [fol. 94] if you hadn't sprained your foot or something some other time or work it out that way.

Q. Yes. Well, you wouldn't be able to tell from an X-ray, you couldn't tell from looking at the X-ray what date the thing was hurt?

A. No, no, you can't.

Q. That's right.

A. You can't do that.

Q. Now, I may have hurt my toe a week before.

A. Yes.

Q. Or the month before, and you wouldn't be able to tell from looking at an X-ray. All right. Now, in your opinion—in your two opinions that you gave to Mr. Dombey with reference to Mr. O'Neill, there is quite a lengthy history about—you took a history from Mr. O'Neill and in both times you examined him, didn't you?

A. I took a history three times and went over it carefully to make sure that there were no discrepancies. That is——

Q. But—and that formed a part of your opinion on this case, did it not?

A. Opinion, yes.

Q. Now, Mr. O'Neill gave you a history of having received a fractured hip in August of 1947, did he not?

A. He had a fractured hip some place in there. I'll have to—1947.

Q. Did he tell you in that history that he was off eighty-one days—off work eighty-one days as a result of that fracture of the hip?

A. No. He said he had a fractured hip in 1947 and was treated and has had no complications.

Q. He didn't tell you that his back was injured in that accident, is that right?

A. No, he did not.

Q. Now, did he tell you about having had a back injury prior to the occurrence of June 22, 1946? He didn't, did he?

A. No, no, he did not.

Q. You didn't see the X-rays that were taken of Mr. O'Neill immediately after his accident by Dr. Picke did you?

A. No, I have never seen them.

[fol. 95] Q. You wouldn't be in a position to say whether the fracture that was revealed in that X-ray was an old fracture or a fracture that occurred on June 22, 1948, would you?

A. No. Once a fracture is stabilized you can't establish your——

Q. Dates?

A. Dates on that.

Q. Now, Doctor Clybourne, you are an osteopath, are you not?

A. Yes.

Q. What associations do you belong to—what medical associations do you belong to?

A. Well, I belong to all the osteopathic associations, and in addition to that I am certified as an orthopedic surgeon, and I have a fellowship in orthopedic surgery, which is the highest thing that you can be given.

Q. You are not a member of the American Medical Association, are you?

A. No, I am a member of the American Ost-opathic Association, and here in Ohio, the licenses are the same.

Q. You are not a member of the American College of Surgeons, are you, Doctor?

A. I am a member of the American College of Ost-opathic Surgeons.

Q. But not the American College of Surgeons?

A. It's comparable.

Q. Now, Doctor, you carry on your practice here at Doctors Hospital?

A. Yes, here and at my office across the street.

Q. What privileges do you have at other hospitals in Columbus?

A. I have no privileges at any other hospitals—I have never asked for any.

Q. All right. Now, Doctor, do you know whether University Hospital in Columbus, Ohio, is approved by the American College of Surgeons?

A. Yes, it is.

Q. Childrens Hospital also is approved by the American College of Surgeons, is it not?

A. Yes.

[fol. 96] Q. Grant Hospital?

A. Yes.

Q. Mercy Hospital?

A. I don't think Mercy is at the present time. I can't say for sure on that.

Q. All right, Mt. Carmel Hospital?

A. Mt. Carmel is.

Q. And St. Ann's?

A. St. Ann's.

Q. St. Anthony's?

A. Yes.

Q. St. Francis?

A. Yes.

Q. White Cross Hospital?

A. Yes.

Q. Columbus State Hospital?

A. I can't say.

Q. Benjamin Franklin Hospital?

A. I imagine it is, I don't know.

Q. Now, is Doctors Hospital—this hospital here—connected or approved by the American College of Surgeons?

A. No, it is approved by the American College of Osteopathic Surgeons which is the same—which has the same recommendation, but it is a member of the Columbus Hospital Federation.

Q. Now, Doctor, after your examination of July 27, 1949, when did you next see Mr. O'Neill?

A. 8-3-50.

Q. And after your examination of 8-1-50, when did you next see him?

A. 5-6-52.

Q. And all three of those examinations were made at the request of Mr. Dombey, the attorney for Mr. O'Neill?

A. They were.

Q. And the purpose of those examinations was in connection with this case that's pending in the federal court, is that right?

A. Evidently they were.

Q. You never saw Mr. O'Neill prior to July 27, 1949, is that right, Doctor?

A. No, I didn't.

Q. Are you an examiner for the railroad retirement board, Doctor?

A. I am.

Q. Did you ever examine Mr. O'Neill, the plaintiff in this case——

Mr. Dombey: Object to this.

[fol. 97] The Court: Overruled.

Q. In connection with his application for disability benefits from the retirement board?

Mr. Dombey: We object.

The Court: Overruled.

The Witness: That I can't answer. I don't have my records here.

Q. You could have, though, is that right?

Mr. Dombey: Object.

The Court: Overruled.

The Witness: I could have, yes, but I don't remember. I don't have my records here.

Mr. Alexander: I believe that is all, Doctor, and I hope we haven't tired you out too much.

Redirect examination.

By Mr. Dombey:

Q. The type of injury that you have described and testified to in this deposition which you found in Mr. O'Neill consisting of a depression of the eighth dorsal vertebra, would that type of an injury enable a man to return to work

in a matter of three weeks, possibly a month, and resume heavy work which is entailed in railroad work?

Mr. Alexander: I object to it, I object to it. You finished your question, didn't you?

Mr. Dombey: Yes.

Mr. Alexander: You have got two questions in there. That should hold it.

Mr. Dombey: Let him answer it. You objected.

The Court: Read the question again.

(Question read.)

The Court: He may answer.

The Witness: Definitely not.

The Court: You mean because it wasn't on direct?

[fols. 98-100] Mr. Alexander: Right.

The Court: If they had brought the doctor in, I would permit them to ask the question.

Q. (By Mr. Dombey) All right, Doctor, will you tell us whether or not your examination and your findings would have been any different whether you testified in this case or not?

A. No, my work—a great part of it is diagnostic work here at the hospital and I do a great deal of it for the doctors around through this center—portion of the country. These reports are exactly the same as any other case.

Q. As Mr. Alexander brought out, you also examine for the railroad retirement board, do you not?

A. I do.

Q. Which is an agency now of the United States government?

A. It is.

Mr. Dombey: That is all.

The Court: Is it an agency created by the employer or employee, or because the railroads were under the government?

Mr. Dombey: No, your Honor, it is equivalent to what is known as Social Security Act.

The Court: I didn't know. All right.

Recross examination.

By Mr. Alexander:

Q. One more question, Mr. Dombey assisted in your appointment to the railroad retirement board as a physician, is that right, Mr. Clybourne?

A. I can't answer that. They——

Q. You don't know whether he did or not?

A. I don't know whether he did or not.

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[fols. 101-114] Motion for Directed Verdict

Mr. Ebinger: Your Honor, the defendant moves that the court direct a verdict in favor of the defendant on the grounds that there is no evidence in the record of any negligence on the part of the defendant.

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[fol. 115] Kenneth K. Kessler, being first duly sworn as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Alexander:

Q. Will you state your name?

A. Kenneth K. Kessler.

Q. Where do you live, Mr. Kessler?

A. Dundalk, Maryland, sir.

Q. Will you state again where you live?

A. Dundalk, Maryland.

Q. Is that near Baltimore?

A. Yes, sir.

Q. Is it a suburb of Baltimore?

A. Yes, sir.

Q. By whom are you employed?

A. The Baltimore and Ohio Railroad Company.

Q. How long have you been employed by The Baltimore and Ohio Railroad Company?

A. Approximately three and a half years.

Q. What is your position with the Baltimore and Ohio Railroad?

A. Engineer of physical tests.

Q. What are your duties as engineer of physical tests?

A. Testing materials of all types.

Q. Now, what background have you had, Mr. Kessler, in metallurgy, if any?

A. Well, I am a graduate of the Penn State Extension College of Ferrous Metallurgy. Employed as metallurgist by the Bethlehem Steel from 1939 to 1942. From '42 to '46 [fol. 116] I spent in the armed forces. From '46 to '48 back with Bethlehem Steel and from '48 up to the present time with The Baltimore and Ohio Railroad Company.

Q. And, with Bethlehem Steel what work were you doing?

A. All types of metallurgical work.

Q. And your duties with the Baltimore and Ohio Railroad is in conducting tests, is that right?

A. Yes, sir.

Q. What society or societies, metallurgical societies, do you belong to, Mr. Kessler?

A. American Society for Metals, American Society for Testing Materials, American Railway Engineer Association, American Foundrymen's Society, National Association of Corrosion Engineers.

Q. Now do you know what the practice is of the Baltimore and Ohio Railroad in purchasing bolts and nuts?

A. Yes, sir.

Q. What is that practice; how are they purchased?

A. The company receives an order with the instructions that the test department will either inspect the material at the plant or waive inspection at that time and inspect it at the storehouses of the company.

Q. In other words, the Baltimore and Ohio Railroad orders bolts and nuts from another company, and your department inspects the bolts and nuts at the company you are buying from, or you make inspection when the bolts and nuts are delivered to The Baltimore and Ohio Railroad Company, is that right?

A. Yes, sir.

Q. Are bolts and nuts ordered pursuant to specifications?

A. Yes, sir.

Q. Did you, in the usual course of business, receive a bolt

that had been used by Francis O'Neill on June 22, 1948, at Newark, Ohio?

Mr. Dombey: We object.

The Court: May I have that question, again?

(Question read.)

The Court: What is the objection?

[fol. 117] Mr. Dombey: Not sufficient evidence as to whether or not that is the bolt or not.

The Court: That part about whether it was used by Francis O'Neill—he wouldn't know that. He can say whether or not he received a bolt.

Mr. Dombey: After all, there is absolutely no evidence here what disposition was made of this bolt.

The Court: How are they going to do it? He may answer whether or not he received a bolt. How could he tell whether it came from Francis O'Neill or was used by Francis O'Neill?

Mr. Dombey: That is what I am objecting to, your Honor.

The Court: I ruled on that in your favor, but he may answer the other question.

Q. Did you, in the usual course of business, Mr. Kessler, receive a bolt that was reported to you in the usual course of business to have been involved in an accident on June 22, 1948, at Newark, Ohio?

Mr. Dombey: Same objection.

The Court: Same ruling. You must reframe the question. He can tell whether or not he received a bolt. Whether it was the same bolt or not you will have to have someone else testify to. Sustain the objection to the question as put.

Q. Did you receive a bolt for test purposes, Mr. Kessler?

A. Yes, sir.

Q. And, did you make a test of that bolt?

A. Yes, sir.

Q. Will you state what your test was and what your findings were?

Mr. Dombey: If the court please, just for the purposes of the record we would like to object to this line of questioning unless there is some identification of this bolt.

The Court: I don't hear you.

[fol. 118] Mr. Dombey: We want to continue the same objection until there is some identification of this bolt. We are not interested in what bolt he examined.

The Court: If they fail to connect it up then the matter will be thrown out, but they certainly have got a right to put in their case. You may answer.

(Question read.)

A. The tests run on the bolt—made a chemical analysis and a hardness test to determine whether or not it would meet the specification for tensile strength. The result of the test was that the bolt met all the specifications which are required by the American Association of Railroads, and also by the American Society of Testing Materials. The failure was not due to faulty material.

Mr. Dombey: We move that the answer be stricken.

The Court: That last part may be stricken.

Mr. Dombey: We would like to know which part.

The Court: The last sentence that something was not due to faulty material, that may be stricken.

Mr. Dombey: And that it was up to the standard of the Association of Railroads, whatever that is, and all of that testimony.

The Court: No, I think he can put it in. Of course, that doesn't mean anything because nobody knows yet what it is.

Q. When did you receive this bolt, Mr. Kessler?

A. If I may refer to my records I could give it to you.

The Court: Certainly.

A. On October 8, 1951.

The Court: October 8, 1951. When was this alleged accident?

Mr. Dombey: June 22, 1948.

The Court: All right.

[fol. 119] Q. From whom did you receive this bolt, Mr. Kessler?

A. From the claims department of the Baltimore and Ohio Railroad.

Q. And, did you receive a letter in the usual course of business accompanying the bolt?

A. Yes, I did.
Q. Do you have the letter with you?
A. Yes, sir.
Q. You received this bolt, you say, from the claims department of the Baltimore and Ohio Railroad?
A. Yes, sir.
Q. What was the bolt purported to be?

Mr. Dombey: We object. Self-serving declaration; violates all the rules of evidence.
The Court: Sustain the objection.
Mr. Alexander: No further questions.

Cross-examination.

By Mr. Dombey:

Q. Mr. Kessler, the bolt that you received, you of your own personal knowledge don't know and didn't know where it came from?
A. Will you repeat that, sir?

(Question read.)

A. No, other——
Q. From your personal knowledge.

The Court: Let him answer the question. You asked it.

A. Not other than from what was contained in the correspondence.
Q. I say, from your personal knowledge, Mr. Kessler. That's my question.
A. No, sir.
Q. Now, what kind of a test did you make of this bolt?
A. Chemical and physical test.
Q. Chemical test and physical test, is that right?
A. And physical examination.
Q. Looking at this bolt, what did the physical examination disclose?
A. The manner in which it failed.
Q. And, what was its physical appearance?
A. Failed due to bending.
[fol. 120] Q. All right, so it bent. What did your chemical test show?

A. Met the chemical requirements of the specification.
Q. What did that disclose?
A. There was nothing wrong with the bolt chemically.
Q. What do you mean by that?
A. Met the requirements of the specification.
Q. That doesn't mean anything to us. The jury would like to know what your test consisted of.

Mr. Alexander: He has answered the question. Let's not badger the witness.
The Court: This is cross-examination.

Q. What did the chemical test consist of?
A. Chemical analysis.
Q. Of what did that consist?
A. We determined the amount of carbon, sulphur, phosphorous, magnesium and silicate in the bolt.

The Court: He didn't ask you that. He asked you what you did. Just to say a chemical analysis means nothing to him, and I am sure it means nothing to the court, and I know it means nothing to the jury. He wants to know what your chemical analysis consisted of, is that right?
Mr. Dombey: That's right.
The Court: All right, you made it, you can tell them.

A. I don't understand.

The Court: What did you do, throw the bolt up to the ceiling and say "there is a chemical analysis"? Is that what you did?
The Witness: No, sir, the normal procedure for determining the chemical analysis——
The Court: He didn't ask that. He asked you what he did.
The Witness: Personally, I had my own chemist run the chemical analysis on this bolt.

[fols. 121-126] Q. You didn't do it?
A. No, sir.
Q. Now, you have the physical test and you have the chemical test. What other test did you make?
A. Physical examination.
Q. What's the difference between a physical test and a physical examination?

A. Physical test, in this case, was to determine the hardness of the bolt, which would correlate the tensile strength of the bolt.

Q. Did you personally do that?

A. Yes, I did, sir.

Q. What did you determine was the tensile strength of that bolt with respect to weight bearing?

A. Approximately 66,000 pounds per square inch.

Q. What would be the weight bearing of the overall length of that bolt?

A. Since the bolt was a half inch bolt, it would amount to approximately 66,000 pounds per square inch.

Q. 66,000 pounds per square inch?

A. In tension.

Q. Do you know whether a weight of 150 pounds would break that bolt in two?

A. I beg your pardon.

Q. Would a weight of 150 pounds break that bolt in two?

A. No, sir.

Mr. Dombey: That is all.

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[fol. 127] Dr. Ralph Pickett, being first duly sworn as provided by law, was examined and testified as follows:

Direct examination.

By Mr. Ebinger:

Q. Will you please state your name?

A. Ralph Pickett.

Q. Where do you reside, Doctor?

A. Newark, Ohio.

Q. How long have you been in the practice of medicine?

A. Sixteen years.

Q. Will you tell the court and this jury your background, your educational background, the training that you have had?

A. I graduated from Denison University in Granville, Ohio, Western Reserve Medical School in Cleveland, Ohio, [fol. 128] residency in surgery at University Hospital in

Cleveland, and residency in orthopedics, also, at University Hospital in Cleveland.

Q. And, where has your office been?

A. Since I have been in practice, it's been in Newark, Ohio.

Q. Where?

A. Newark, Ohio.

The Court: How far is Newark from here?

Mr. Ebinger: About thirty miles, Judge.

Q. What type of practice are you in, Doctor?

A. My practice is limited to surgery.

Q. Now, you are acquainted with Francis G. O'Neill, the plaintiff in this cause, pending in the federal court here?

A. I am.

Q. Now, directing your attention, Doctor, to June 22, 1948, what occasion did you have, if any, to see Mr. O'Neill on that date?

A. On June 22, 1948, I was called to the roundhouse in Newark, and Mr. O'Neill had been injured, and I found him lying on the floor at the roundhouse. I gave him first aid treatment there and sent him to Newark Hospital.

Q. When you gave him treatment, will you describe what you did?

A. Yes, I applied bandages to the lacerations on his face and sent him to the hospital.

Q. Now, you say you sent him to the hospital. What, if anything, did you do at the hospital as far as Mr. O'Neill was concerned?

A. I had X-rays made of his chest and his back, and I applied rib belt, I sutured his lacerations, also.

Q. Did you make an examination of him at that time?

A. Yes, sir.

Q. What did you find?

A. I found that he had four rather deep jagged lacerations of the left forehead, over the left eye, the left cheek and the left side of the nose. Also had a swollen crooked [fol. 129] nose which caused a noise when you moved it, which we call crepitus. He had a large swelling over the left cheek, and of course he was bleeding from all these wounds, and his face and neck were covered with blood. He had bruises of the chest and he complained of pain in the chest.

Q. You say that you took X-rays?

A. I had them taken at the hospital.

Q. Now, what, if anything, did you find as a result of those X-rays?

A. Both of my own personal study of the X-rays and from the report of the X-ray specialists, we found that there were no broken ribs, but there was an old compression of the eighth dorsal vertebra.

The Court: There was a what?

The Witness: An old compression of the eighth dorsal vertebra.

The Court: Were those X-rays put into evidence?

Mr. Alexander: Not yet.

Mr. Dombey: Yes, they were, Judge.

Mr. Alexander: That's all.

Cross-examination.

By Mr. Dombey:

Q. Now, Doctor Pickett, when you arrived at the scene of the accident, you found Mr. O'Neill in a prone position?

A. That's right.

Q. And you asked him about his complaints?

A. That's right.

Q. And among other things, he complained about his back?

A. I can't recall exactly now what he did complain about.

Q. You won't say he didn't will you?

A. No, I wouldn't say so.

Q. I will ask you whether or not, after that complaint, you made a sort of manipulation examination of his spine [fol. 130] to determine whether there was any evidence of a broken back?

A. I would guess that I did. I am not positive.

Q. All right. You would only do that pursuant to complaint, wouldn't you, of a condition in the back?

A. Well, I would do that with anybody who had been bruised through the chest.

Q. But, you would do it particularly if the patient complained about his back?

A. Oh, yes, I certainly would.

Q. And, then, following that, how was he removed——

A. He was——

Q. —— to the hospital?

A. He was carried on an ambulance cart to the hospital.

Q. He was placed on a stretcher?

A. That's right.

Q. At the scene of the accident?

A. That's right.

Q. Now, you don't put a person on a stretcher if he only has facial injuries?

A. Yes, sir, I put anybody on a stretcher that's in the shop.

Q. But, in this case you knew that he had complained about a back injury?

Mr. Alexander: He didn't testify to that.

Mr. Dombey: This is cross-examination, your Honor.

The Court: But you cannot mislead the witness. I don't think you intentionally did that. I think the question was improper. I sustain the objection.

Q. Now, you stated before, Doctor, that you don't remember whether or not he complained about his back, is that right?

A. That's right.

Q. And if he did complain about his back and if you did make the examination, that would be more reason to put him on a stretcher, isn't that true, so you could take X-rays before you would permit him to get up?

A. I would say, yes, to that question.

[fol. 131] Q. Now, that's what was done in this case, is that right?

A. He was placed on a stretcher and taken to the hospital, yes.

Q. When he was taken to the hospital, did you meet him at the hospital?

A. Yes, sir, I was there when he arrived.

Q. What did you do?

A. I had the X-rays made, and I sutured the lacerations of his face after cleaning them out as best I could.

Q. Now, you had X-rays made of his spine, the dorsal region, didn't you?

A. That's right.

Q. You did that because he complained of a pain in his dorsal region?

Mr. Alexander: Object.

The Court: On what ground?

Mr. Alexander: That he hasn't so testified.

The Court: Of course, after all, it is cross examination. The doctor ought to be able to watch the questions and answer them.

Mr. Alexander: Not to mislead him, though.

The Court: Let's have the question. I would say to the doctor, listen to the question. The doctor seems to be able to take care of himself.

(Question read.)

Q. Is that right?

A. No, sir.

Q. You mean, then, that you took X-rays of his dorsal spine without him complaining of an injury in that area?

A. As I stated before, I don't recall whether he complained of pain in his back. He did complain of pain in his chest and shortness of breath, and the dorsal spine is part of the chest. When you take X-rays of the ribs you take the anterior part for the ribs, and you also take the dorsal spine to show the back of the ribs where it is attached to the spine. [fol. 132] Q. But, I want to ask you now, to the best of your recollection, whether or not he did or did not complain about a pain in his dorsal area of his spine?

A. I don't think he did, but he may have. I won't say definitely.

Q. Now, Doctor, did you make some notes as a part of the record of the Newark City Hospital on the day that you took him in there?

A. Yes, sir.

Q. I want to read this to you, which is a part of the hospital statement. It says here: "Doctor Pickett's statement. Saw him at roundhouse and had him moved by ambulance to the hospital. Examination reveals lacerations of the left forehead and cheek." Do you remember that, Doctor?

A. Yes.

Q. You went on: "Contusions of the chest." Do you remember that, Doctor?

A. Yes.

Q. "Contusions and fracture of the nose." Is that right?

A. That's right.

Q. "And abrasions of the left side of the back."

A. I don't recall if I said that.

Q. "And shoulder."

A. I suppose that's my statement.

Q. And then you said, "Patient admitted for X-ray examination and observation."

A. That's right.

Q. Now, does that recall to your mind what transpired at the time you removed Mr. O'Neill to the hospital and what your examination disclosed with reference to his back?

A. If that's my statement, as you say, I agree with it.

Q. And, that would be a part of the Newark City Hospital record, wouldn't it?

A. That's right, that's one of the progress notes. I will accept that.

Q. Now, Doctor, when were these X-rays taken?

A. I would have to check the hospital records with reference to the exact time.

[fol. 133] Q. Now, Doctor, you came here to testify, didn't you?

A. Yes, that's right.

Q. And you knew all these records were available?

A. That's right, I have my office records.

Q. Will your office records answer these questions?

A. As to the date the X-rays were taken and the time of day?

Q. Yes.

A. I am not sure they will or not. They usually just put on the X-ray report the date.

Mr. Alexander: If the court please, I think the doctor is confused.

The Court: What is the objection?

Mr. Alexander: The doctor says he can answer.

A. The X-ray was taken, according to this, the following day, on the twenty-third.

Q. Now, Doctor, who took the X-ray?

A. One of the technicians employed by Doctor Piatt.

Q. Did you personally study that X-ray?

A. Yes, I did.

Q. You said in your direct examination that there was evidence of an old compression fracture to the dorsal vertebra?

A. I don't believe I used the term fracture. I said old compression.

Q. Old compression to the eighth dorsal vertebra. How did you arrive at that conclusion?

A. The anterior portion of the vertebra was narrower than the posterior portion. In other words, there was a wedging of the vertebra in the X-ray.

Q. Is that the only reason that you arrived at that conclusion?

A. Well, that it was old?

Q. Yes.

A. No, I arrived at that also because there was considerable condensation——

The Court: What?

The Witness: Condensation of the bone.

Q. Any other reason that you used in arriving at that conclusion?

A. At the time I saw the X-ray?

[fol. 134] Q. Yes.

A. No, no other reason at the time I saw the X-ray.

Q. Were any reports submitted to you by Doctor Piatt in connection with this X-ray film?

A. Yes, an X-ray report was submitted the following day.

Q. Do you remember what that report disclosed?

A. I can refresh my memory from the records here. The X-rays showed no evidence of fractures of the ribs, but there was some compression and anterior wedging of the eighth dorsal vertebra. Condensation suggested this was an old injury. There was also widening of the intervertebral space between the eighth and ninth and fifth and sixth dorsal vertebra.

Q. Is that all the report that you had?

A. That's all I have on my records here.

Q. Now, I will ask you if you have X-ray No. 5041?

A. I have no X-rays with me at all. I am not an X-ray specialist.

Q. Now, I will refresh your memory if this is not the complete report that you got to which you have just made reference?

The Court: Just a minute, gentlemen, why isn't the only fair way to do it, to introduce it and let him look at it?

Mr. Dombey: You mean we can't question the credibility of this witness?

The Court: He said he didn't remember.

Mr. Dombey: He read parts of it, and I want to refresh his mind to see if this is the entire report. He said he thought that was the entire report.

The Court: I don't think that questions his credibility. He said he didn't remember.

Mr. Dombey: I want to see if he does remember.

The Court: Are those in evidence?

[fol. 135] Mr. Dombey: No, your Honor, they will be in evidence on rebuttal, if necessary.

The Court: Is there any objection?

Mr. Alexander: No objection.

By Mr. Dombey:

Q. I will ask you if this isn't the exact report that was submitted to you by your technician, X-ray technician?

A. I would like to correct this. An X-ray technician doesn't make reports.

Q. Then this is your report?

A. No, sir. Technicians make no reports. X-ray specialist makes reports.

Q. Then you say—this is signed by you, Doctor Pickett—"Findings, my summary", meaning your summary. "No radiographic evidence of recent fracture of ribs posteriorly on the left sid.e" That's what you testified to, is that right?

A. That's not my report. I made no X-ray report myself.

Q. Is that what you testified to as your record of the X-ray report?

A. I said no evidence of fracture of the rib.

Q. Then you say, "Dorsal spine, compression of body of

eighth dorsal with anterior wedging." Did you find that in that plate, according to your report there?

A. Yes.

Q. "Heighth of vertebra reduced about one-third." Is that the report you made in the hospital record?

A. I made no report in the hospital record.

Q. You deny that?

A. I made no X-ray report.

The Court: The defendant has made no objection, but I think the only fair thing is to present this to this man, let him look at it and ask him if that is his report.

Mr. Dombey: I don't have the original, your Honor, but the original will be available.

The Court: You can't ask a man a lot of questions about something that happened four years ago, and then test his [fol. 136] credibility because he says he can't remember. Let him take a look at it.

Q. Now, did you make this report, and I want you to read it.

A. I will read it, but I made no X-ray report.

The Court: Did you get one and endorse it? Was that the report that came to you? All this jury is interested in is not seeing whether or not you can be confused, they want to know what you did.

Q. Read that.

A. I will read it out loud. This is pen and ink.

Q. The original will be produced. We will so state to the court. If Doctor Pickett denies this the original will be produced.

The Court: Have you compared this with the hospital records?

Mr. Dombey: Yes, we have.

Mr. Alexander: I don't know what he is talking about.

The Court: There is no objection. Go ahead.

A. "6/22/48. X-ray No. 5041 B. & O. X-ray of upper thoracic ribs and dorsal spine. Referred by Doctor Pickett. Findings: my summary." Whose summary is that?

Q. Yours.

A. No.

Mr. Alexander: Unless this is a report that Doctor Pickett made we are objecting to it.

The Court: This is part of the hospital records. At least he says it is. If you want to object because the hospital records are the best evidence, I am going to let you object.

Mr. Alexander: Object.

The Court: Sustain the objection.

Mr. Dombey: Your Honor, I do want to appeal to this extent. Here is a doctor who comes in and says this is an old fracture, when the records show otherwise.

The Court: You are testifying. The jury will pay no attention to statements by counsel.

[fol. 137] Mr. Dombey: Exception.

The Court: The court will warn counsel now not to make statements about what is or is not in the record. This man has testified. You can test his credibility. You can bring in the hospital records.

Mr. Dombey: That is what I am endeavoring to do.

The Court: You haven't brought them in. You admit this is a copy, and they object until you bring the originals, and the court will sustain the objection.

Mr. Dombey: Your Honor, I can only get them in on rebuttal, and they will be here for rebuttal.

The Court: He says he doesn't remember.

Mr. Dombey: He didn't say that.

The Court: If he will deny anything, that is something entirely different. You say this is the record.

Q. All right. I will ask you if in that report you didn't state: "One can note condensation paralleling the superior surface of the body of the eighth dorsal which suggests the fact that this may be an old injury." Did you say that?

A. I didn't say it.

Q. Is that your testimony?

A. That is not.

The Court: What is your testimony?

The Witness: Doctor Piatt is the X-ray man.

The Court: Now, Doctor, please pay attention. And if you don't remember what is in there, all you have to say is, "I don't remember what it is."

The Witness: He asked me if that was my statement.

The Court: You say it is not?
The Witness: It is not.

Q. Was that Doctor Piatt's statement to you?
A. I can't remember for sure.
Q. You have no reports that Doctor Piatt submitted to you?
[fol. 138] The Court: He didn't say that. You can get the hospital reports here right away and then show them to him and ask him if that isn't the report that was made.

Mr. Dombey: I want to ask the witness this question.

Q. In that report submitted by Doctor Piatt to you, didn't Doctor Piatt say, "However, one cannot rule out a telescoped on the body of the eighth dorsal"?
A. I think he said that. I would say that he did say that.
Q. So, as a matter of fact, when you came in here and you said unqualifiedly that this compression fracture of the eighth dorsal was an old one, that is not what Doctor Piatt said, did he?
A. Yes, Doctor Piatt told me definitely it was an old one, and I agreed with him.

Q. Now, I will ask you whether or not in addition to that compression of the eighth dorsal there was any evidence of an injury to any other of the dorsal vertebrae?
A. No.

Q. Who is Gerald Erhard?
A. Gerald Erhard is a partner of Doctor Piatt, and they are both X-ray specialists and they are in charge of the X-ray department of the hospital.

Q. Do you know of an X-ray that was taken on 9/9/48 of Mr. O'Neill by Doctors Piatt and Erhard?
A. What is the date—9/9/48?

Q. Yes.
A. Yes, there would be one taken at that time.

Q. I will ask you if in that X-ray report to you the doctors reported that there was, in addition to the compression fracture of the eighth dorsal vertebra a compression fracture of the sixth dorsal vertebra?
A. I think there was a statement of that kind.

Q. So, as a matter of fact, the X-rays disclosed not one

but two compression fractures of the dorsal vertebrae, the eighth and the sixth?

A. I can't be sure, but I think that is true. I don't remember whether it was stated whether they were fractures. [fol. 139] You are using the term fracture where they say dorsal compression.

Q. I will say fracture and you use what term you want to. The point is, what do you have to say about the extent or the length of the injury to the sixth dorsal vertebra, what ever it was?

A. After it was made in September I sent the patient to Baltimore for treatment.

Q. I don't think that is answering my question.

A. As far as I know, there was never any fracture of the sixth dorsal vertebra.

Q. As far as you know, but the X-rays that you ordered taken of Mr. O'Neill and that were submitted to you, showed both a compression fracture of the eighth and sixth dorsal vertebra?

A. They showed a compression. I don't know that they showed any fracture, ever.

Q. Now, do you remember receiving that report from Doctor Piatt's office of 9/9/48?

A. I don't remember the exact date, but I received at least four reports from their office at various times, and if they made it, I received it.

Mr. Dombey: Mark this Plaintiff's Exhibit 3.

(The paper referred to was marked Plaintiff's Exhibit 3 for identification.)

Q. Now, Doctor Pickett, I will hand you what for purposes of identification has been marked as Plaintiff's Exhibit 3, and ask you whether or not that is an accurate reproduction of the reports submitted by Doctor Piatt to you under date of April 2, 1949?

A. May I compare this with the one I have in here?

Q. Why certainly.

The Court: Has counsel compared this with the original?

Mr. Alexander: No.

Mr. Dombey: You may compare it.

A. I would say that that was an exact copy.

[fol. 140] Q. All right, Doctor, now that you have your own, I would like to ask you some questions about this report.

The Court: What does this purport to be?

Mr. Dombey: The report on the X-ray.

The Court: This is a report from Gerald A. Erhard, Doctor, to you, concerning Francis O'Neill, made on April 2, 1949, is that right?

The Witness: That's right.

Mr. Alexander: If the court please, we are objecting to any testimony coming in indirectly from Doctor Erhard. If they want to call Doctor Erhard, they should call him.

The Court: He, as I understand it, sent the man over there to be X-rayed.

Mr. Alexander: Who did?

Mr. Dombey: Doctor Pickett.

The Court: At least that is the question. You gentlemen raised no objection at all. Now he is getting the report from the doctor to whom your man——

Mr. Alexander: If that is the situation.

The Court: At least he asked that question, didn't you, Mr. Dombey?

Mr. Dombey: Exactly. He has the original report of the doctor.

The Court: You sent him over in October, isn't that true? That is what he said, and the doctor said yes. There is no objection raised.

By Mr. Dombey:

Q. Now, Doctor, what did Doctor Erhard have to report to you with reference to the condition of the eighth dorsal vertebra on that date as compared to the original pictures taken on the date of the accident?

The Court: Are you introducing this?

Mr. Dombey: Yes

The Court: You haven't offered it yet.

[fol. 141] Mr. Dombey: I can't offer it in their case until it is identified.

The Court: He has identified it. He has compared it and said it is the same.

Mr. Dombey: I will introduce it in evidence.

The Court: Is there any objection?

Mr. Alexander: No objection.

The Court: It may be received.

Plaintiff's Exhibit 3 was offered and admitted in evidence.

The Court: Now, you can read from it.

Q. Now, will you kindly read to the jury the report that you got from your X-ray doctors concerning Mr. O'Neill?

A. "Examination of the dorsal vertebrae in the ap and lateral projection, spotting over the eighth dorsal vertebrae again shows the compression fracture of the body of the eighth dorsal which apparently is of approximately the same amount of compression anteriorly that was noted on the previous film study. The only film actually available for comparison was one made on June 22, 1948, at which time the compression was noted. The compression at this time is more marked than was seen on the original film study, but from the reports of the previous film studies with the films not available, it appears that there is no further narrowing since the posterior aspect of the eighth dorsal measures approximately 30 mms. while the anterior margin measures approximately 16 mms. The irregularity also is somewhat diminished since the last study."

Q. Now, Doctor, so, as a matter of fact, in that report submitted to you by Doctors Piatt and Erhard, there was still some changes being noted in the condition of the eighth dorsal vertebra?

A. Yes, as compared to the original.

Q. Now, wouldn't that, Doctor, determine how old the fracture is or was?

A. No.

[fol. 142] Q. It wouldn't?

A. No.

Q. Now, Doctor, will you kindly refer to your records and get the report from Doctor Piatt on 9/9/48?

A. I don't have that report available.

Q. Why don't you have it?

A. I couldn't find it when I looked through my files.
Q. You couldn't find it?
A. No, sir.

The Court: Is there a report made to him?
Mr. Dombey: Yes, your Honor.
The Court: It is not part of the hospital records, or is it?
Mr. Dombey: It is also part of the hospital records.
The Witness: It is not part of the hospital records.
Mr. Alexander: We are objecting. May we see what he is purporting to show the witness?
Mr. Dombey: Surely.
Mr. Alexander: We are objecting to it. It is somebody's handwriting.
The Court: What is it supposed to be?
Mr. Dombey: I am going to show the court, and show the court the importance of it.
The Court: Is it the original record?
Mr. Dombey: This is a copy of the original report sent to Doctor Pickett. Doctor Pickett says he received it but he can't find it.
The Court: Is the original available?
Mr. Alexander: We assume it is. That has been copied from it. This is apparently counsel's handwriting. We are objecting to it.
Mr. Dombey: This is a ground for impeachment.
The Court: It is not a ground for impeachment, not the way you have laid it. If you object because it is not the original, I will sustain the objection, but if you in the same voice admit it is a copy, I will admit it.
[fol. 143] Mr. Alexander: I don't know.
Mr. Dombey: I want to put this question, if I may, at least for the purpose of the record.

Q. I will ask you, Doctor Pickett, if you did not receive a report from Doctors Piatt and Eberhard over the signature of Doctor Eberhard, covering X-ray No. 5454, submitted to you on 9/9/48, which was as follows:

The Court: Just a minute. Are you going to read it?
Mr. Dombey: Yes.
Mr. Alexander: Object.

The Court: Gentlemen, you have got to object, the court isn't going to object for you.

Mr. Alexander: We object.

The Court: Sustain the objection.

Are you going to read what it says after the court told you to get an original?

Mr. Dombey: We don't know whether we can get the original.

The Court: Find out. If you can't, bring it in as secondary evidence.

Mr. Dombey: Exception.

By Mr. Dombey:

Q. Now, Doctor, you say you received a report from Doctor Erhard concerning Mr. O'Neill dated 9/9/48 but you are unable to find it, is that right?

A. May I refresh my memory, again, sir? The only way I can answer that with certainty, in a letter which I wrote on September 14 I have this statement: "Several days ago I had recheck X-rays made of his dorsal vertebra." That's several days prior to September 14. I don't remember the exact date.

The Court: Do you remember or don't you?

The Witness: He asked a specific date.

The Court: Answer if you can.

The Witness: I can't remember a specific date.

[fol. 144] Q. You say you do or do not remember?

A. I do not remember any specific date.

Q. I will ask you if in any of the reports that you received from Doctors Piatt and Erhard this statement was contained in that report.

Mr. Alexander: Objection.

The Court: Sustain the objection. Now, I will tell counsel not to read anything unless you show this court the original is not available, and then you can put it in as secondary evidence. That is the rule of the court.

Mr. Dombey: Now, your Honor, may we ask opposing counsel this question?

The Court: The court has ruled three times, and the court tells counsel you can't do it and you are not permitted

to. Now, you know how to prove something. The hospital records are available. If you can't get the hospital records, then you can put in secondary evidence.

Mr. Dombey: No, your Honor, I would like to ask this question of opposing counsel in the presence of the court, whether or not Doctor Piatt is going to make his appearance here, as they stated he was.

The Court: They can answer it if they want to.

Mr. Alexander: We are not going to answer. We are going to try our own lawsuit.

The Court: I think you have that right.

Mr. Dombey: I want to note an exception to the court's ruling.

The Court: Is it your contention that you can introduce a copy of a record that you have made, your own copy?

Mr. Dombey: Your Honor, it is my contention that I am laying a foundation for impeachment, which I am permitted to do, and I can't do it in any other way except put [fol. 145] a specific question to the witness and let him admit it or deny it. If he denies it, it is up to us——

The Court: You haven't laid it properly.

Mr. Dombey: How can you lay it properly?

The Court: You can get the original.

Mr. Dombey: If we get the original, that is the impeachment, your Honor.

The Court: All right. The court has ruled. You can get the original and introduce it if you want to, or ask him questions, but you are asking him to answer some questions that he says he doesn't remember. Anyway, I have ruled. He hasn't said anything wrong yet. I mean by that, he hasn't denied anything.

Mr. Dombey: This question I haven't asked him, your Honor.

The Court: You are going to get before the jury what you claim has been said.

Mr. Dombey: Save our exceptions.

Q. Now, Doctor, you are not an X-ray specialist, are you?

A. That's right.

Q. And, therefore, your opinion as to whether or not this compression fracture was the result of the accident of 6/22/48, or whether it antedated or not, isn't that true?

A. What was the last of your statement?

Mr. Alexander: Read the question.
Mr. Dombey: Strike out the question.
The Court: Are you going to reframe it?
Mr. Dombey: Yes.

Q. Dr. Pickett, since you are not an X-ray specialist, you are not in position to say whether or not there was a recent or old fracture, isn't that true?

A. Legally I am in no position to say that, that's right.

[fol. 146] Q. Beg pardon?

A. Legally I am not. After all, I am a doctor. I have an opinion as to what it is.

Q. Therefore, you don't want to make a positive statement that this was a fracture of either one date or another, do you?

A. I won't make a statement whether it is a fracture of one date or another.

Q. Now, Doctor, following your taking of the X-rays at the hospital, how long did you keep Mr. O'Neill in the hospital?

A. He left the hospital on June 25, 1948.

Q. Did he leave voluntarily or at your suggestion?

A. He left at my suggestion voluntarily. I didn't put him out.

Q. Beg pardon?

A. He left voluntarily at my suggestion.

Q. Now, did you tell him what he should do after he left the hospital, whether he should go to bed or work?

A. I told him definitely what I thought he should do.

Q. What was that?

A. I told him he shouldn't work.

The Court: We will take a recess.

(A brief recess was taken.)

By Mr. Dombey:

Q. Now, Doctor, I will ask you whether or not you suggested to Mr. O'Neill, at the time you discharged him from the hospital, to go home and go to bed?

A. I told him to go home. I don't recall I told him to go to bed.

Q. Now, I will ask you, Doctor, if you remember making your recommendations in the hospital record on 6/24/48, which was two days following the accident?

A. I certainly wrote a note. I don't remember what it was.

Q. And, I will ask you if in that note you didn't say that he still had a swelling of the nose?

A. That's right.

Q. And cheek?

A. That's right.

Q. And that he is to remain in bed at home?

A. Well, if I said that, that's what I told him.

[fol. 147] The Court: Will you keep your voice up?

The Witness: That's what I told him. If I said it on my notes, I told him to stay in bed at home because of his cheek.

Q. And that he will be under the care of Doctor Pollock during your absence, so apparently you were leaving.

A. I was gone for four or five days, I don't remember.

Q. Now, do you know a Mr. Connely?

A. Yes, I know a Mr. Connely.

Q. Is he connected with the B. & O. Railroad?

A. Yes.

Q. Did he have any conversations with you concerning Mr. O'Neill and his condition during the time that Mr. O'Neill was confined in the hospital?

The Court: May I have the question again, please?

(Question was read.)

The Court: Who is Connely?

Mr. Dombey: He is Mr. O'Neill's superior with The B. & O. Railroad Company.

The Court: He may answer.

A. I can't exactly, but I usually do talk to the men who work with him.

Q. Do you remember whether or not you told Mr. Connely Mr. O'Neill's condition and your recommendation about him going to bed after he was to be released from the hospital?

A. I don't know that I told Mr. Connely anything like that.

Q. You don't remember that?

A. No.

Q. You won't say one way or the other?

A. No, that's right, could be either way.

Q. Do you know, Dr. Pickett, that Mr. O'Neill went to his place of employment at the request of Mr. Connely on the twenty-sixth day of June, which was four days following this accident?

[fol. 148]

A. I don't know for sure he did. I didn't order him to go. That's my job to tell him when to go to work.

Q. It is your job to tell him when to go to work, and you did not recommend to anyone with the B. & O. that he should go back to work on the twenty-sixth?

A. No, that's right, I did not.

Q. You felt he was a bed patient at that time, is that right, Doctor?

A. If that's what I said in the record, that's what I thought.

Q. Now, Doctor, I will ask you if it isn't a fact that sometime after this accident Mr. O'Neill told you that he had suffered an injury to his low back sometime in the year of 1945 while at Willard, Ohio?

A. Mr. O'Neill did tell me on the day that we took the X-ray that he had an old injury to his back.

Q. And he told you it was in the lumbar region?

A. He didn't tell me. He said he just had a back injury.

Q. And, you didn't go into it?

A. He didn't recall the exact things at the time.

Q. But, you didn't go into it with him beyond that statement to you?

A. Not at that time. I may have later.

Q. And, that statement came from Mr. O'Neill to you voluntarily, right?

A. Well, I think he answered in answer to a question after I had seen the X-ray.

Q. You think you asked him that question?

A. Yes.

Q. Do you know whether you made that notation in any way in your notes?

A. I don't recall whether I did or not.

Q. It would be of sufficient importance for you to make a note of that, wouldn't it?

A. If I was asking it for my own information and I had the information and it had nothing to do with the present [fol. 149] injury, I didn't see why it would be necessary to be in the notes, no.

Q. So, in any event, that was the fact and that was the extent of the conversation with respect to the previous injury?

A. I think that's true.

Q. Do you remember, Doctor Pickett, that Mr. O'Neill told you that he was off about three or four weeks and then went back to his regular employment following that back injury?

A. I don't remember the exact length of time, but it was approximately three weeks or a month or sometime.

Q. And that he had no specific treatment for it?

A. I think that's true.

Q. And that he worked from then on until the present accident?

A. That's right, off and on.

Q. Now, Doctor Pickett, what is the normal treatment for a compression fracture?

A. The normal and accepted treatment is to reduce the fracture and place the patient in a plaster cast.

Q. You didn't do it in this case?

A. No, sir, I didn't think there was any fracture.

Q. You didn't think there was any fracture?

A. That's right, any recent fracture.

Q. You mean by that, do I understand, that the condition that you found in the eighth dorsal vertebra, in your judgment, didn't require the application of a cast?

A. That's right.

Q. So, how do you go to reduce or treat this condition that you found with respect to the eighth dorsal vertebra, assuming that it occurred on the day of this accident?

A. Occurred on the date of June 22?

Q. Yes.

A. If I assumed it occurred on that date I would have put him in a cast.

[fol. 150] Q. So you just assumed it didn't happen on that day?

A. I not only assumed it, I had evidence to show that it was old, so I didn't do it.

Q. Now, Doctor, what is the purpose of putting on a cast on an individual?

A. The purpose of putting on a cast is to immobilize or keep down the movement in the vertebra while he is up walking around.

Q. So, now, assuming, Doctor, that perhaps you were wrong in your judgement as to the date of the injury to the eighth dorsal vertebra, and that it did occur on June 22, 1948, the failure to put on a cast would possibly cause further damage to that area, wouldn't it?

Mr. Alexander: Objection. That is assuming a condition.

The Court: He has a right to ask that question if he wants to.

Mr. Dombey: Read the question.

(Question was read.)

The Court: Perhaps you should reframe that question. Read that again.

(Question read again.)

The Court: He did not say the date of the injury. You can reframe that, that it did not occur on that date.

Mr. Dombey: I just want the opposite.

The Court: I will sustain the objection to the question as asked. You may reframe it if you want to.

Q. Well, assuming, Doctor Pickett, that Mr. O'Neill sustained the compression fracture to the eighth dorsal vertebra on June 22, 1948, would the failure to put a cast upon him on that date possibly further injure that area?

Mr. Ebinger: Object, your Honor. He said there wasn't any.

The Court: What?

[fol. 151] Mr. Ebinger: He said there wasn't any injury on the twenty-second day of June, 1948.

Mr. Dombey: We are not bound by his answers. He is their witness.

The Court: You have a right to cross examine him. He certainly has the right to ask, if it happened on that day shouldn't you have done this, that or the other thing.

The Witness: I would like to ask about one word in that question. Does that say "assuming that a compression fracture occurred on that day"?

Mr. Dombey: Yes.

The Court: Do you want it "a fracture" or "this fracture"?

Mr. Dombey: Let's have the question read, your Honor.

(Question was read.)

The Court: Do you understand the question?

The Witness: I understand it but I would like to have it clarified by you, if I could. If this means that this is a fracture which I have never admitted was a fracture——

Mr. Dombey: I don't care whether you admitted it. Assuming that this was a compression fracture——

Mr. Alexander: That was the basis of my objection, that he is assuming something that the doctor has testified to the contrary.

The Court: Has there been testimony by some doctor?

Mr. Dombey: Ridgeway.

Mr. Alexander: No, Doctor Ridgeway didn't connect this, did not connect the condition that he found in any way with this.

Mr. Dombey: Doctor Ridgeway said that the injury to the eighth dorsal vertebra was a compression fracture.

[fol. 152] Mr. Alexander: But he didn't connect it with this occurrence.

Mr. Dombey: That is up to the jury.

The Court: The question is proper if Doctor Ridgeway said that. This man hasn't said so.

Mr. Dombey: I will appeal to the record, and I think the jury remembers his testimony.

The Court: My memory on Doctor Ridgeway or the other doctor is that somebody said it, one or the other. Now, he is representing, at least, that that was said. If that was not said, then, that is entirely different, and if it develops

that counsel is mistaken, it might mean ground for a new trial in the event of a decision in this case. But, he says he remembers it. My recollection is the same as counsel, but you are not going on my recollection. If you want to ask the question it will have to appear that he did say so.

Mr. Dombey: I still want the question answered.

The Court: That's all right, you may.

Mr. Alexander: Do you understand the question?

The Witness: I understand the question.

The Court: Is it "the compression fracture"?

Mr. Dombey: Yes.

The Court: You say "the compression fracture" and this man refuses to answer because under his theory there is no compression fracture. If you want to change that to "suppose he received a compression fracture", that is different.

Mr. Dombey: We will conform to the court's suggestion.

The Court: Don't you think it is so, yourself? Don't change your question because of the court.

Mr. Dombey: I want it answered: I don't want the objection sustained to it.

[fol. 153] The Court: You will have to reframe your question.

Q. Now, do you understand it, if that is changed to "a compression fracture"?

A. That's an assumption. Assuming that I can answer that, I think it would make a difference.

Q. What difference would it make?

A. Actually, I am——

Q. I am asking you a hypothetical question. I want you to give the jury your answer as to what effect the absence of the cast would have on that area.

A. In answer to that, as the facts of the hypothetical question, I would say it would make the fracture worse.

Q. And that would also apply to a fracture of a sixth dorsal vertebra, wouldn't it?

A. Certainly.

Q. Which is the greatest point of mobility in the spine?

A. The lumbar spine.

Q. Now, Doctor, I will ask you whether or not you had many conversations with Mr. Connely concerning Mr.

O'Neill, say, between September 15 and the date of your original examination?

A. I don't recall over one or possibly two.

Q. I will ask you if it isn't a fact that you told Mr. O'Neill on different occasions between those dates that Mr. Connely was urging you to send Mr. O'Neill back to his regular work?

A. Is that pertaining specifically to Mr. Connely now?

Q. Yes.

A. I would say yes.

Q. And you would not give in?

A. That's right.

Q. And, did you know, Doctor Pickett, that following four days after this accident Mr. O'Neill was going to his place of employment day after day at the request of the company officials, namely, Mr. Connely?

A. I found that out later.

[fol. 154] Q. And, that was against your recommendation?

A. That's right.

Mr. Dombey: Now, your Honor, my information is that the hospital chart will be here at one-thirty this afternoon, and we would like to suspend the examination of Doctor Pickett until such time, for further cross examination.

The Court: Have you got a copy that you will swear is a copy?

Mr. Dombey: That is what I endeavored to use here.

The Court: Yes, but counsel cannot impeach a witness in the manner in which you claim that you were trying to impeach him.

Mr. Dombey: You wanted the original, your Honor.

The Court: He says he can't remember the details of the report he made. Anyway, his remembrance is of no value. It is the report itself. If these gentlemen will admit that this is on the report—show it to them, ask them whether or not he made such a report. If he denies it, then you can impeach him.

The Witness: That will not be on the hospital report. That was made after the patient left the hospital a long time.

Mr. Dombey: I am just following the court's suggestion. Apparently we can't get an agreement on this. Now, we

have done the best thing we can. We have called long distance to have the librarian here with the record at one-thirty, and we should be permitted to cross examine the doctor on that record.

The Court: I am not going to stop you from cross examining the doctor. It seems to me counsel ought to be able to sit down there and agree if this is the record, or if this is the report. I don't know whether it is or not, but you [fol. 155] certainly cannot impeach man by saying, "Didn't you say so and so?", and he says, "I don't remember."

Mr. Dombey: He didn't say he didn't remember. I wasn't permitted to ask the question.

The Court: Yes, but you were going to get in front of the jury something that might not be admissible.

Mr. Dombey: That wasn't my intention. That's the reason I went ahead and got the original record.

Mr. Alexander: The doctor says it isn't in the hospital record.

The Court: There is something wrong here. He says he copied it from the hospital record.

Mr. Alexander: The patient was only in the hospital three days. That date he gave was a long time after that.

The Court: There you are: You see, the court was right after all.

Mr. Dombey: The gentleman got it out of the hospital record.

The Court: All right, if counsel says so, I believe him.

Mr. Dombey: We would like to suspend the cross examination until we get the records.

The Court: You may call the next witness.

Mr. Alexander: Do we understand that the witness has to return at one-thirty? Let us look at what Mr. Dombey is trying to get in. If we can help the doctor out we will try to do it.

If the court please, he has here reports prepared by Doctor Piatt. If he wants to call Doctor Piatt, let him call Doctor Piatt, but we are not going to agree to the admission of this.

The Court: Is Doctor Piatt the doctor to whom your man was sent?

[fol. 156] Mr. Dombey: That's right.

The Court: Do you deny that, gentlemen?

Mr. Alexander: No, we don't.

Mr. Dombey: These reports we want are part of the hospital record.

The Court: The doctor will have to come back, I am sorry.

Mr. Ebinger: Here are some pencil notations that all of us make. We just don't know. It isn't typed, it is just pencil on a pad. I don't think we would be in position to know what they mean.

The Court: If you don't want to admit, it is all right with me. It must be all right with counsel. You can't impeach a witness on a written document that he has made unless he denies something about it. "Didn't you say so and so?" His conclusion of what he said might be entirely different than somebody else's conclusion, and he can't be expected to give verbatim what may be made in a record four years ago.

Any other questions?

Mr. Dombey: I want to suspend the examination until we have the hospital records.

The Court: What time do you want them back? They say they can't agree to it, and of course, counsel must recognize you can't introduce a copy.

Mr. Dombey: I don't know what else we can do. The court suggested agreement. They don't want it.

The Court: I mean in introducting it in the first place. You must appreciate you must get the original record.

But, I will tell counsel on the other side that if they object to this because it is made by another doctor, I am going to let it in if the report is made to your own doctor concerning this case.

[fol. 157] Mr. Ebinger: All we are asking is for the original record, and there has been ample time for counsel for the plaintiff to get it.

(Court adjourned until one-thirty in the afternoon.)

Tuesday Afternoon Session, May 13, 1952

DR. RALPH PICKETT, resuming the stand, testified further as follows:

Cross-examination (Continued)

By Mr. Dombey:

Mr. Dombey: Mark this Plaintiff's Exhibit 4.

(The document referred to was marked Plaintiff's Exhibit 4 for identification.)

Q. Now, Doctor Pickett, this morning on cross examination I asked you about a report that was submitted to you on September 9, 1948 by Doctor Gerald A. Erhard covering the X-ray films, taken of Francis O'Neill, being X-ray No. 5454, B. & O., and ask you if that is a part of the hospital records of the hospital of the city of Newark?

A. Yes, it is.

Q. Now, do you remember getting that report from Doctor Erhard?

A. Yes.

Mr. Dombey: I offer this in evidence.

The Court Any objection?

Mr. Alexander: Yes, sir.

The Court: On what ground?

Mr. Alexander: It is a report prepared by Doctor Erhard. If they want reports prepared by Doctor Erhard, let them produce Doctor Erhard.

The Court: Overruled.

Mr. Dombey: Now, I would like to have the doctor read that to the jury.

The Court: You can read it or he can read it.

[fol. 158] Mr. Alexander: May I object in this regard, your Honor. This man did not make this report, and you are requesting him to read a report made by another doctor.

The Court: Yes. I have seen people on the witness stand read a newspaper and they never had anything to do with it. This is a report, as I understand it, made to your doctor by another doctor at his request.

Mr. Dombey: That's right.

By Mr. Dombey:

Q. Is that right, Doctor?

A. Yes.

The Court: Do you insist upon the objection?

Mr. Alexander: Yes, your Honor.

The Court: You still insist?

Mr. Alexander: Still insist.

The Court: What is your reason?

Mr. Alexander: That it is a report by another doctor stating his opinion about the matter. It isn't Doctor Pickett's opinion at all.

The Court: Overruled.

The Witness: "September 9, 1948, X-ray No. 5454."

The Court: May I say this to the jury, that this is not to go into the record as being Doctor—what's his name—opinion. That is not the purpose of it at all, but it is to show the information that this man had from his own doctor. Whether it is Erhard's opinion or not, I don't know. It is not in here to prove Erhard's opinion.

The Witness: "X-ray No. 5454, B. & O. Case of Francis O'Neill. X-ray of: Spot films over the eighth dorsal vertebrae. Referred by: Dr. Pickett. Findings: Examination of the mid and lower dorsal spine in the AP and lateral projections reveals the previously described compression fracture of the eighth dorsal vertebrae with what appears [fol. 159] to be slight loss of the disc space between D-7 and D-8. Since the old films are not available for comparison it is difficult to state whether there is any further compression than on the previous film study. The anterior margin of the eighth dorsal vertebrae measures approximately 16 mms while the posterior margin measures approximately 30 mms so that marked irregular wedging is noted. There also appears to be slight narrowing of the anterior left lateral aspect of the sixth dorsal vertebrae with approximately 5 mms distance between the anterior and posterior aspect of the body of this vertebrae.

"Conclusion: Compression fracture of the eighth dorsal vertebrae with what appears to be a lesser fracture of the sixth dorsal vertebrae. The exact period of duration of these injuries cannot definitely be stated since the old films are not available for comparison."

By. Mr. Dombey:

Q. Now, do you or do you not agree with that report of the X-rays that you ordered from Doctor Erhard?

The Court: If he saw them. Let's find out first whether he ever saw them.

Q. I will withdraw that question and ask you whether or not you had occasion to examine the X-rays taken on that date?

A. I did not, no, sir.

Q. Now, which X-rays did you personally examine, Doctor?

A. The ones taken on June 23, 1948.

Q. And the others you did not examine?

A. These I did not examine. They were sent to Baltimore.

Q. All right, sir. Now, when you received that report, what if anything did you do toward placing a cast on Mr. O'Neill?

A. I didn't place any cast on Mr. O'Neill.

[fol. 160] Mr. Dombey: Mark this Plaintiff's Exhibit 5.

(The document was marked Plaintiff's Exhibit 5 for identification.)

The Court: He refers to certain films not being available. Had he reference there, or don't you know, to the films that you took originally back in 1948?

The Witness: That's right.

Q. Now, Doctor Pickett, I will hand you what is a permanent record of the Newark hospital, and that is your signature?

A. That's right.

Q. So, this is a part of your record?

A. That's right, sir.

Q. Now, I will hand you what has been marked as Plaintiff's Exhibit 5 and ask you what that is?

A. That's an X-ray report made by Doctor Piatt to me about the upper thoracic ribs and dorsal spine of Francis G. O'Neill.

Q. And was that made at your request?

A. That was made at my request.

Q. And, you were mistaken about the date of that X-ray? It was taken on June 22 instead of June 23?

The Court: I thought we corrected that this morning.

Mr. Dombey: Well, he stated it this afternoon. I offer this in evidence.

The Court: Any objection?

Mr. Alexander: Our objection is for the same reason as the other objection.

The Court: It is part of the hospital record part of his record?

Mr. Dombey: Yes.

The Court: Made by a doctor hired by him?

Mr. Dombey: Yes.

Mr. Alexander: It is a report by Doctor Piatt to Doctor Pickett.

[fol. 161] The Court: Overruled.

Q. Now, will you read that report to the jury, please.

A. "June 22, 1948, X-ray No. 5041, B. & O. Case of Francis G. O'Neill. X-ray of: Upper thoracic ribs and dorsal spine. Referred by Dr. Pickett.

Findings: Examination of the upper thoracic ribs fails to visualize any radiographic evidence of recent fracture of the ribs posteriorly on the left side.

Further examination of the dorsal spine reveals compression of the body of the eighth dorsal with anterior wedging. The heighth of the vertebrae has been reduced approximately one third. One can note condensation paralleling the superior surface of the body of the eighth dorsal which suggests the fact that this may be an old injury, however one cannot rule out a telescoped on the body of the eighth dorsal. There can also be seen slight sharpenings at the margins of the bodies of several of the other thoracic vertebrae. The intervertebral space between the eighth and ninth dorsal seem to be slightly widened. There is also suggestive widening between the bodies of the fifth and sixth. The intervertebral foramina appear normal. There is slight increase in the dorsal kythosis on the mid thoracic vertebrae.

Conclusion: Radiographic findings reveals a compression of the body of the eighth dorsal which may be an old injury.

No evidence of further boney fracture of the dorsal vertebrae or the upper thoracic ribs can be ascertained."

Q. Now, Doctor——

The Court: Did he complete the letter?
Mr. Dombey: Yes.

Q. Did you, Doctor?
A. Yes.
[fol. 162] Q. Now, Doctor, what did Doctor Piatt mean when he said, "However, one cannot rule out a telescoped on the body of the eighth dorsal?"

Mr. Alexander: We object to what Doctor Piatt may have meant.
Mr. Dombey: What does that indicate to him. He is an expert.
The Court: He may answer.
A. It indicates that Doctor Piatt said there was a possibility that it could be that.
The Court: Of course, what we are trying to find out is what that means. I don't think the jury knows and I know I don't know.
The Witness: That's a common X-ray custom known as hedging.

Q. What do you mean hedging?
A. X-rays are notorious sometimes. They get on the middle of the fence and they don't like to give you a complete report.
Q. Does that suggest that there is a possibility or probability that that was the result of the injury on June 22, 1948.

The Court: I don't know what goes before that, but if it means what he says it means, shouldn't you read what goes before that?
Mr. Dombey: I will read the whole thing, your Honor. He says this, your Honor. See if I am reading correctly. " • • • the superior surface of the body of the eighth dorsal which suggests the fact that this may be an old injury, however one cannot rule out a telescoped on the body of the eighth dorsal."

The Court: In other words, although he says it may be, it may not be.

[fol. 163] Mr. Dombey: It may not be, and we want to know what is meant by telescoped.

The Court: That is what he says it means, isn't that it?

Mr. Alexander: Why don't we let him answer it, then.

The Court: I will be very happy to, but I thought that's what he said.

Q. What does that mean to you?

A. Well, having gotten this report, I went to see Dr. Piatt.

Q. I didn't ask you that.

Mr. Alexander: Let him answer the question.

Mr. Dombey: I want the question answered.

The Court: What do you mean by telescoped? Is that what you want?

The Witness: That means that he did not like to say he was absolutely positive, and he left that probability that it could be telescopic.

Q. That it could be the result of the injury of June 22, 1948?

A. I don't know whether that it what he means or not.

Q. You don't know?

A. I would think that that's what he means.

Q. You say you don't know?

A. Yes.

Q. Now, Doctor, in case of a doubt as to whether a man has a compression fracture or not, what is the better part of wisdom, to put on a cast or not to put on a cast?

A. If there is a question of a compression fracture?

Q. Yes.

A. Do you want to say a recent compression fracture?

Q. Yes.

If there is a recent compression fracture he should have a cast on it.

Q. Now, do you notice in those reports submitted to you by Doctor Erhard on September 9, that you have read to [fol. 164] the jury, that the doctor says, "Conclusion: compression of the eighth dorsal vertebra."

A. Yes, I see that.

Q. Do you disagree with that?
A. With what he concludes?
Q. Yes.
A. I think it is his conclusion.
The Court: He didn't ask you that. He asked you whether or not you agree with that. I think the question is perfectly proper.
Q. Whether this was a compressed fracture or not of the eighth dorsal.
A. I don't agree with that as a definite diagnosis.
Q. You don't agree with your own X-ray technician?
A. No.
The Court: Now, just a moment—all right, there is no objection, so it is all right.
Q. So, if there was a compression fracture, as your X-ray technician reported to you, at your request, and that there was a doubt as to whether or not it happened on the twenty-second day of June 1948, would it not have been proper for you to apply a cast instead of doing otherwise?

The Court: Is this an action for malpractice?
Mr. Dombey: No. He is the agent of the company.
The Court: You haven't gotten anything in here to show that this is aggravated because of a wrong diagnosis. You haven't made the doctor a defendant here.
Mr. Dombey: I am not——
The Court: There is no objection, so I guess——

By Mr. Dombey:

Q. Are you the B. & O. doctor?
A. Am I the B. & O. doctor?
[fol. 165] Q. Yes.
A. I am a B. & O. doctor, fee for service doctor.
Q. You were a B. & O. doctor back in June of 1948?
A. Yes, I handled cases.

Mr. Dombey: Is that question to be answered or not?
The Court: What is the last question?
The Reporter (Reading): So, if there was a compression fracture, as your X-ray technician reported to you at your request, and that there was a doubt as to whether or not it happened on the twenty-second day of June 1948, would

it not have been proper for you to apply a cast instead of doing otherwise?

Mr. Alexander: We object to it because Doctor Piatt said that this was an old compression fracture.

Mr. Dombey: Why not let the evidence speak for itself.

The Court: I should think counsel would object when the question is put, not wait until the court has directed three or four questions to his attention.

Mr. Alexander: The reason we are not objecting, we did not object, we would rather have the jury have the witness' information.

The Court: It is not information when you have got a witness practically charged with malpractice or wrongdoing and nothing is done to protect the witness.

Mr. Dombey: Your Honor, I want to make my position clear. We are not trying the doctor on malpractice, we are trying this doctor's credibility, which is very important in this case as to whether this was a fracture of June 22, 1948 or a previous fracture. That's the whole issue that I am putting to this doctor, and the jury wants to know that, I feel.

[fol. 166] The Court: The jury understands that they are not charging a wrongdoing here, it goes to his credibility, although I don't see how it possibly can go to his credibility.

You make the objections and I will rule on them.

Mr. Alexander: We object to the question, then.

The Court: What question?

Mr. Alexander: To the last question.

Mr. Dombey: I won't ask it.

The Court: You withdraw it?

Mr. Dombey: Yes.

Q. You have before you a report of September 9, 1948, submitted by Doctor Erhard, is that right?

A. No, I have the June 22nd. You took the other one.

Q. You have that report; I have the report of September 9, 1948 before me. Now, Doctor, what significance, if any, did the report of September 9 have on the report of June 22, 1948, when it mentions some slight loss of disc space between the dorsal seven and dorsal eight that was not mentioned in that report you have before you?

The Court: Do you understand the question?
The Witness: Yes, I do.
The Court: Read that question again and see.

(Question read.)

Mr. Alexander: I object to the question. I am certain I don't understand what it means.
The Court: I don't think counsel intends to ask it that way, what significance one can have upon the other. You don't mean that.
Mr. Dombey: The development mentioned in the report of September 9 that was not disclosed in the report of June 22, your Honor, as noting different changes.
[fol. 167] The Court: That isn't the significance of one upon the other. I think your choice of words might be objectionable. I don't think that is what you intend. I think I know what you are trying to get at.

Q. Do you understand that question?
A. Yes, I understand it.

Mr. Alexander: I object to it.
The Court: If he understands it, it is immaterial whether you understand it or not.

Q. The report of June 22 showed widening of the space between the eighth and ninth, and as you say, the report of September 9 shows narrowing. It simply means the patient was in a different position on the table. That's all it means to me.
Q. Now, Doctor, what if any significance did you attach to the report of September 9 as compared to the report of June 22, 1948, in which it was for the first time disclosed to you that Mr. O'Neill also had a compression of the sixth dorsal vertebra?
A. It meant that——

Mr. Alexander: Does the witness understand that question?
Mr. Dombey: The witness is ready to answer.
The Court: I don't think he will answer it if he doesn't.
A. I don't understand it. I just wanted to ask him to clarify it.
The Court: Just say, "I don't understand."

Repeat the question.

(Question was read.)

A. May I answer that question by reading my report that I made here?

Q. No, you answer the question.

[fol. 168] The Court: I think he can refresh his memory from the report.

Q. Do you have to have it?

A. I was going to say what significance it meant to me. I was going to explain it.

Q. If you remember, just tell us.

Mr. Alexander: If he wants to refresh his memory from a report, I don't see why he shouldn't.

The Court: If he can't do it any other way, he certainly may refresh his memory.

Q. Do you remember?

A. Yes.

Q. Tell us.

A. Since the question was brought up in the report of September 9, after a suggested fracture of the sixth dorsal vertebra which hadn't been mentioned hitherto, I requested the patient be sent with his X-rays to Baltimore, and that was done.

Q. You didn't at that time apply a cast?

A. No, sir, I did not.

Q. Now, you of course don't know personally when that compression fracture took place in the sixth dorsal vertebra do you?

A. I don't know personally that there was a compression fracture of the sixth vertebra.

Q. You never look at the plates?

A. That's right.

Q. Certainly you are not going to say that that was not the result of the injury of June 22, 1948, are you?

Mr. Ebinger: Object.

The Court: What is your objection?

Mr. Ebinger: There is no evidence.

The Court: There isn't any evidence. All you have got in here is a record that somebody else sent to him. He is

not bound by that. This witness says so far as he is concerned, there never was any. He says it now and he said [fol. 169] it this morning, and he says he doesn't agree with the other report that was sent in.

Mr. Dombey: But he never saw the plates.

The Court: That doesn't make any difference. He can't testify. You have a right to bring in this other witness.

Mr. Dombey: Very well, I won't press it.

Q. Now, Doctor, did you, on your study of the X-ray plates or plate on June 22, 1948, note the presence of any arthritis in the area of the eighth dorsal vertebra?

A. Yes.

Q. Where does that appear in your record?

A. In my record?

Q. Yes.

A. It doesn't appear any place.

Q. But everything else you put down in writing, is that right?

A. I didn't make the X-ray report at that time.

Q. The report sent to you didn't contain anything about the presence of arthritis, did it?

A. It does. "There can also be seen slight sharpenings at the margins of the bodies of several of the other thoracic vertebrae."

Q. Does that mean arthritis?

A. Absolutely.

Q. Now, did you tell Mr. O'Neill about what injury he had or what the X-rays disclosed with reference to his back?

A. I did.

Q. You mean to tell me that you told Mr. O'Neill that he had a compression fracture?

A. No, I did not.

Q. What did you tell him?

A. I told him that his X-rays showed he had an old compression of the eighth dorsal vertebra.

Q. When did you tell him that?

A. The day I got the X-ray report and saw the X-ray.

Q. Did Mr. O'Neill raise any objection to you sending him to Baltimore at any time?

A. No.

Mr. Alexander: We object to that.

[fol. 170] The Court: I think it is proper. He may have some purpose.

Q. Do you know which doctors examined Mr. O'Neill at Baltimore?

A. Not for certain.

Q. Did you receive any reports from him?

A. No, I did not.

Q. They didn't send any reports?

A. No.

Q. Now, Doctor, have you ever had a patient who suffered a compression fracture of either the eighth or sixth vertebra as a result of drinking beer?

A. I would like to have that qualified, if I may.

Q. Just answer the question.

The Court: You mean as the direct result, not something that happened after he had drunk too much? You don't mean that a man might have an accident after drinking beer?

Mr. Dombey: That is exactly what I mean. I mean whether or not the beer would cause the compression fracture.

The Court: I ask you whether you meant that he drank so much beer that he went out and fell down the stairs.

Mr. Dombey: No.

The Court: I didn't think you meant that.

Mr. Dombey: Counsel brought that out in Doctor Clybourne's deposition, your Honor.

The Court: Not the way you put the question.

Mr. Dombey: No, but if it is not pertinent in this case why did he bring it?

The Court: Was there any claim that he got a fracture as a result of drinking beer?

Mr. Ebinger: That's the first time in this lawsuit we have heard that.

[fol. 171] The Court: All I heard, at times he got irritated, or something else, as a result of drinking beer. You may ask the question as long as you mean what I think you mean, or what you intended.

Mr. Dombey: I will let the question stand.

The Court: I have let it stand.

The Witness: I have never had a chance—that's what you asked, I believe. I have never had a patient or seen a patient that had either a fracture of the eighth or sixth dorsal vertebra as a direct result of drinking beer.

Mr. Dombey: I believe that is all.

The Court: I don't want counsel to mistake the court as meaning you can't show the contrast between this man's alleged diagnosis and the diagnosis of somebody to whom he sent him. Now, you understand that, do you, counsel?

Mr. Dombey: Yes, your Honor, I understand.

Redirect examination.

By Mr. Ebinger:

Q. Doctor Pickett, what is your connection with the Newark Hospital?

A. Chief of the surgical service and chief of the fracture service of Newark Hospital.

Q. What other professional organizations are you connected with?

A. I am a member of my county and state medical societies, American Medical Society, Fellow of the American College of Surgeons, Fellow of the International College of Surgeons, Fellow of American Fracture Society.

Q. You are a surgeon, Doctor. Now, as a surgeon, you read X-rays that are made for your purpose?

A. Certainly.

Q. And, you do that a great deal, don't you?

A. Yes, in my work.

Q. Now, you stated here that following the accident of June 22, 1948, that you—I think it was right at the hospi- [fol. 172] tal—that you told Mr. O'Neill he shouldn't work at that time. Now, why did you tell him he shouldn't work?

The Court: I don't get you now.

Mr. Ebinger: Doctor Picket stated he had told Mr. O'Neill at the hospital that he should not work at that time. I am asking the doctor why he told him that.

A. The man had just had a serious injury, bleeding from wounds. He had lost blood and had a swollen nose and swollen cheek, and I didn't feel he was in any condition to work.

Q. It was because of the injuries to the lacerations he had?

A. The chest and face.

Q. Now, Doctor, you stated that he had a compression of the eighth vertebra?

A. I did.

Q. You stated that you had conferred with Doctor Piatt?

A. That's right.

Q. As a result of the X-rays that Doctor Piatt took for you?

A. That's right.

Q. Will you please tell this court and jury, as the result of those conferences, what Doctor Piatt and you agreed to?

Mr. Dombey: I believe we will object to that form.

The Court: He can tell what his conclusion was.

Q. What your conclusion was.

A. After consulting with Doctor Piatt, after receiving the X-ray report and going over the X-rays together——

The Court: Which X-rays?

The Witness: The ones of June 22, 1948.

The Court: Did you look at the other ones? Just as long as we know what you base it on.

A. —I concluded from my discussion that he did not have a compression fracture of recent origin.

[fol. 173] Q. Now, are you still taking care of Mr. O'Neill, or seeing Mr. O'Neill at all now?

A. I don't see him for his injury. I am taking care of his mother and see him every day.

Mr. Ebinger: That's all, Doctor.

Recross-examination.

By Mr. Dombey:

Q. Doctor, I want to ask you, if a man that had a compression fracture of the eighth dorsal vertebra could resume heavy work within a period of three weeks to one month?

A. He could resume it in much less than that.

Mr. Dombey: That's all.

The Court: Now, as I understand it, you claim this man did not have a compression fracture of recent origin?

The Witness: That's right.

The Court: What is the name of your assistant?

The Witness: Doctor Piatt.

The Court: And, he said he had a——

The Witness: No, he did not.

Mr. Dombey: I don't think that is fair. The reports are here.

The Court: I want to find out.

Mr. Dombey: Then the court is going into conversation of the other doctor, which the court excluded.

The Court: I did not exclude that. I mean what his letter says; I mean according to the letter. What does the letter say? You read these things and I am sure the jury does not get it. Well, they are going to get it.

The two doctors made a report to you?

The Witness: This is Doctor Piatt's.

The Court: Read what he says about whether or not there was a compression fracture.

[fol. 174] The Witness: "Conclusion: Radiographic findings reveals a compression of the body of the eighth dorsal which may be an old injury."

The Court: Now, he doesn't go one way or the other, does he?

The Witness: No, sir, not in that report.

The Court: That's all we have here. You can't tell what he told you on the side.

What does the other doctor say?

The Witness: This was made in September, your Honor, September 9, by Doctor Erhard. His conclusion was: "Compression fracture of the eighth dorsal vertebrae with what appears to be a lesser fracture of the sixth dorsal vertebrae."

The Court: He says he did have a compression fracture?

The Witness: That's as of September 9 he said that. He says, "The exact period of duration of these injuries cannot definitely be stated since the old films are not available for comparison."

The Court: I am trying to find out what these doctors say, and I think the jury is interested in what they say.

Whose report is that September 9 report?

The Witness: Doctor Erhard.

The Court: Erhard says he does have. On June 22 the other man says he does not know whether he has or not?

The Witness: That's right.

The Court: And you say he has not?

The Witness: I say he has no recent compression fracture.

The Court: Do they mention "recent" in here?

The Witness: Yes, he says, "May be an old injury."

The Court: The other man?

[fols. 175-223] The Witness: The other man doesn't say. He says the exact period of duration cannot be determined.

The Court: That is all we are interested in, finding out what they say.

You say even if he had a compression fracture of recent origin he should be able to work?

The Witness: No, sir, I don't say. I say he could work. He asked if he could do heavy work.

Mr. Dombey: That's exactly what I asked.

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RENEWAL OF MOTION FOR A DIRECTED VERDICT

Mr. Alexander: If the court please, the defendant, Baltimore and Ohio Railroad Company, at this time would like to move for an order directing a verdict in this case for the defendant, The Baltimore and Ohio Railroad Company.

Now, our reasons are as follows: That there has been no showing of any negligence on the part of the railroad in this case.

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[fol. 224] CHARGE OF THE COURT AND EXCEPTIONS THERETO

The Court: Ladies and gentlemen of the jury, counsel have completed their arguments in this case, and I think that they have done very well on both sides. It is an unusual case to argue, a difficult case to argue, and a difficult case to try. It is even difficult for the court in his instructions because this is not the usual run of cases.

There is a point that will come up in this case that the court asks you to pay particular attention to. Of course,

I want you to pay attention to everything, but there is something I will direct your attention to at the proper time.

May I say, now, that attorneys get enthusiastic for their own side of the case. It may appear that they are a little bit too enthusiastic. But, you know, I warned you at the start. You are not trying the attorneys in this case. And, of course, you are not to be prejudiced by anything except the testimony that you hear here and give your best judgment to that testimony, with the idea not of rewarding the attorney or the side that you think is perhaps the brighter of the two, or the smarter, or presented their case the better, but with the idea of doing justice to both parties.

The court never knew either side of this case before it came here. Of course, I don't know Mr. O'Neill, and fortunately or unfortunately, the B. & O. doesn't run up into my part of Michigan, so I am not acquainted with that. So, I had no prejudices, and I think that you saw that I tried to treat both sides the same. If they were wrong it didn't make any difference who it was; at least, that was the intention of the court. But, let no facial expression of the court, if you saw one or thought you saw one, or any comment of mine, interfere with your judgment. The court is not settling this case, except as to the law.

You have heard the evidence and it now, as I say, becomes my duty to charge you. You are the sole judges of the [fol. 225] facts; they are exclusively within your province and you, as I say, are required to accept the law of the court, and by applying the law, as explained to you, to the facts in this case you will arrive at your verdict.

This is an action brought to recover damages by Francis G. A. O'Neill of Newark, Ohio, an individual, against the B. & O. Railroad. Now, the parties to this suit, one an individual and the other a corporation, come into this court on the same basis of absolute equality in so far as their identity is concerned. They are entitled to consideration of the court and jury upon that basis. The fact that one is a corporation and the other an individual must not be given any bearing in determining the issues of the case.

Now, discussing for a moment the evidence in this case, the court will charge you that not all matters properly coming to your attention may be considered by you as evidence.

The pleadings, for example, are not evidence, but you have heard the pleadings challenged in this case and you have a right to take into consideration the fact that they were amended. But, you must also remember this, that the plaintiff himself does not write the pleadings. The attorneys do. And, if they require amendment the court usually permits an amendment. But, the opening statements of counsel, the remarks of the court and counsel during the course of the trial, and the closing arguments of counsel are not evidence, and you are not to consider them as such in deciding the facts of this case. This applies also to the evidence that has been stricken out or that you have been instructed to disregard.

On that point may I say this. There is a way to present evidence, if it is proper. If it is not proper, it is the duty of the court to strike it out. You shall not be influenced in any way by statements made in open court by counsel [fol. 226] of either side. "We tried to prove this." If they tried to prove it and it was there, the court would have permitted it, had the proof been proper. All you are bound by is the proof that is here, not by what someone says he tried to prove. That goes for both sides.

However, the exhibits that have been offered and admitted in evidence are evidence, and you are to consider them in the same manner as you consider other evidence in the case. The facts admitted in the pleadings, those thereafter stipulated and agreed upon in open court, and those presented in proof by one party and uncontradicted by the other, if material to the issues made up by the pleadings, may be accepted by you as established facts and considered by you as such.

You have before you the testimony of witnesses which is somewhat contradictory. Not as much in this case as usual. And where it is contradictory, it is your province as well as your duty to reconcile, in so far as possible, such contradictions. We do not go under the assumption that people intentionally lie, especially under oath, and where sometimes it may appear to be a contradiction, perhaps you can say, "Well, both of them may be true, viewing it from their side."

As I remember, the four Gospels are full of contradictions, according to some people, and yet they do not differ

any more than the testimony of four honest people trying to testify to an automobile accident that all of them saw, and perhaps all four of them saw in a different way.

So, you do try to reconcile contradictions, if you can. It is your duty to accept that which appears in your best judgment to be entitled to the greater weight.

As you are the sole judges of the weight of the evidence, so also are you the sole judges of the credibility of the [fol. 227] witnesses. Now, credibility, you know, comes from the old Latin word, I think, credo, I believe. How much do you believe the witnesses? That is up to you. You see them. You can tell by looking at them, "I believe that fellow," "I don't believe that fellow." You should consider his conduct on the witness stand, the probability or improbability of his statements, his prejudice or interest in the case. You have a right to take into consideration here the interest of people in a lawsuit. Are they to profit by it, or are they not? But, because they have an interest does not necessarily mean they are not telling the truth. You should consider whether or not the witness is corroborated in any way, his appearance on the stand, his manner of testifying, his apparent candor and fairness, or lack thereof, and finally, all the facts and circumstances which reflect upon his credibility, and then it is for you to say what weight shall be given to his testimony.

Now, in this case testimony has been given by doctors expressing opinions on various questions, and that class of testimony is proper and competent concerning matters involving special knowledge, skill or experience in some subject which is not within the realm of the ordinary experience of mankind, and which requires special training, research or study to understand. The law allows those skilled in that special field to express opinions, and upon a hypothetical state of facts given them to say whether or not according to their experience and research a fact may or may not exist. But, nevertheless, while such opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them.

Jurors are not bound by the testimony of experts. Their testimony is to be canvassed and weighted as that of any other witness. Just as far as their testimony appeals to

[fol. 228] your judgment, convincing you of its truth, you should adopt it, but the mere fact that a witness is called an expert and gives opinions upon a particular point does not necessarily obligate the jury to accept his opinion as to what the facts are.

Now, as I have already stated, the pleadings in this case are not evidence and you are not to consider them as such, but they do outline the claims and contentions of the parties and they define the subject matter of the dispute.

Plaintiff in this case alleges that he has suffered a permanent disability and that he would be from fifty to sixty per cent disabled. Now, what does that mean? Well, he is a railroad man. He cannot carry on his work on the railroad in the way that he has been. That is the testimony, of the doctors here—I think that is not agreed. There is a contradiction on that, is there not?

Mr. Dombey: No, your Honor.

Mr. Alexander: Yes, there is.

Mr. Dombey: Doctor Pickett gave no opinion as to his disability.

The Court: I think that is true.

Mr. Alexander: But there is a conflict in the plaintiff's own testimony.

The Court: Between fifty and sixty per cent.

Mr. Alexander: No.

The Court: Well, you will remember, ladies and gentlemen, whether or not there is a conflict here. I do not at this point remember that. It is up to the jury to remember, anyway. And, that he suffered great pain at the time, will continue to suffer some pain, or great pain, some humiliation, and that he has incurred and will be required to incur expense in the future for medicine, medical attention and other necesary treatment.

[fol. 229] Now, the Federal Employers Liability Act, under which this action is brought, provides as follows:

"Every common carrier by railroad upon engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from

the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its appliances, machinery, track, road bed * * * or other equipment."

Gentlemen, there are some stars here; parts that I have omitted are marked by stars, and if there is no objection the stenographer will copy those in at the proper place. They do not affect the trend or the thought expressed.

It is conceded that the plaintiff in this case was employed in interstate commerce at the time of the accident. That is conceded. But, the answer of the defendant denies all of the allegations of plaintiff's complaint and amended complaint relative to the negligence of the defendant. They say, "We were not negligent"; the plaintiff says, "You were negligent." The plaintiff also says, "I am free from contributory negligence."

I do not believe, gentlemen, that there is any reason to submit to the jury the question of comparative negligence. Does either side think that?

Mr. Alexander: We would like to be heard on that.

The Court: Do you want it, or don't you?

Mr. Alexander: Yes.

The Court: Have you prepared a request on that?

Mr. Alexander: We haven't.

The Court: I would like to find out if there is any possible evidence of comparative negligence in this case. Approach the bench, please.

[fol. 230] (Discussion among court and counsel.)

The Court: Counsel will correct me if I am wrong. There is a charge of negligence by the plaintiff against the defendant, and that that negligence was the proximate cause of the injury. The plaintiff claims he is free from contributory negligence. The defendant claims it is not negligent at all.

I think that I will cover this charge on negligence the same as I would in any other lawsuit, and then explain the difference to the jury. The case rests upon the theory of negligence. Negligence on the part of the defendant is not presumed. It is incumbent—follow me closely because now I am telling you what happened in the ordinary case.

I feel that I must do that so that I can explain to you why this case is a little different on the question of negligence. In the ordinary case it is incumbent upon the plaintiff to establish any negligence claimed against the defendant company by a preponderance of the evidence. The plaintiff has the burden of actually proving every element of his case by a preponderance of the evidence. Likewise, any claimed contributory negligence on the part of the plaintiff is not presumed. In order for the defendant to benefit by such a defense, it must establish by a preponderance of the evidence, no matter by whom produced, that the plaintiff was guilty of such contributory negligence.

If you find that both the plaintiff and the defendant were guilty of negligence which directly and proximately caused the injuries to plaintiff, you will then determine what portion of the combined negligence of the plaintiff and defendant shall be attributed to each, and the total damages must then be reduced by an amount that bears the same ratio in relationship to the total damages as the plaintiff's negligence bears to the combined negligence of both parties. [fol. 231] In other words, your verdict shall be for an amount representing the total amount of damages reduced by an amount in proportion to the amount of negligence, if any, attributable to plaintiff.

This is not easy for you to get, all attorneys do not get it, and sometimes the court does not, so it is not easy to understand. I think I can explain it better this way. Suppose you arrive at the conclusion here—and I take an absurd figure so you won't get any idea that I feel a certain way about the amount—that the plaintiff ought to recover. Now, you say to yourself, if the plaintiff was not negligent at all he could recover $100. You see, I take an absurd figure. But, you say to yourself that he is half to blame for this so he can only recover $50. Now, suppose you say he is a third to blame. Then he recovers two-thirds of the amount that he would have recovered had he not been to blame at all.

Is there any question about that, gentlemen? Are you agreed that that is the doctrine of comparative negligence?

Mr. Dombey: Yes, your Honor.

Mr. Alexander: Yes, your Honor.
May I approach the bench?

(Discussion with the court.)

The Court: I think I made it very clear to this jury that I say, if you arrive at that point. I haven't gotten to it yet, but I want to explain to you what comparative negligence is. I do not say that the plaintiff should recover, that the defendant should recover. I do not say that there is any negligence on one side or the other.

But, if you arrive at the conclusion that the plaintiff should recover, when you get through with the charge here, and if you say the plaintiff had nothing to do with it, that it was the fault of the defendant, then you fix the [fol. 232] amount. If you say both sides were negligent, but the plaintiff was, let us say, half as negligent as the other, or was equally negligent, that does not mean the plaintiff can recover, it means he recovers 100 per cent less any amount that he negligent.

What is negligence? Negligence is the failure to do what an ordinarily careful and prudent person would have done in the same or similar circumstances, or the doing of what such a person would not have done in the same or similar circumstances. Accordingly, negligence may be the doing or the failure to do what an ordinarily careful and prudent person would have done or omitted doing, in the same or similar circumstances. To determine whether the defendant was negligent in a particular respect, the inquiry of the jury should be: Was the defendant's conduct in that respect such as would have been the conduct of an ordinarily careful and prudent person in the same or similar circumstances? If the defendant's conduct came up to that standard of care which in law is called ordinary care, it was not negligent, and it is not liable to this plaintiff no matter what damage resulted from such conduct. If its conduct fell below such standard of care, then it was negligent, and if such conduct was the direct and proximate cause of the damages complained of, then the plaintiff may recover. Likewise, the plaintiff is required to exercise that degree of care for his own safety that is required by the defendant, that is, ordinary care. You can't go ahead blindly and suffer an accident and then claim to recover for it.

At various times in this charge it will be necessary for the court to state to you that before there can be any recovery for any negligence for which the defendant may be found guilty, it must be established that such negligence, if any, was the direct and proximate cause of the injury [fol. 233] complained of by the plaintiff. By direct and proximate cause—now, the word is proximate, p-r-o-x-i-m-a-t-e, not approximate as sometimes juries and people think—it is the proximate, the near cause, unbroken by any new and independent cause, which produces the event and without which the event would not have happened.

It will also be necessary to frequently use the term "preponderance of the evidence." You will remember, I differentiated to this jury between a criminal case and a civil case. This is a civil case. In a criminal case the evidence that would have been required would have been beyond a reasonable doubt. But, this is a civil case and the evidence that is required is what is called a preponderance of the evidence. By a preponderance of the evidence is meant the greater weight of the evidence. It does not mean the greater number of witnesses. It means that the evidence produced on the part of the party upon whom the burden of proof rests must in your estimation have a greater weight, a more convincing effect, than the evidence produced in opposition thereto.

That is the ordinary case. As I say, to me a charge under this particular kind of a case is difficult. But, remember this, the plaintiff has got to prove negligence. The plaintiff must show, in order to recover the full amount that he would be entitled to if the defendant is negligent, himself free from contributory negligence or the doctrine of comparative negligence that I have explained to you steps in.

But, there is a distinction that I must direct to your attention, and that is in this case a doctrine of law enters that is known as res ipsa loquitur. Now, you know how I feel about doctors who come in and throw Latin expressions at you and walk out and leave you more mixed up [fol. 234] than you started out, with the anterior, posterior, dorsal something or other. So, I am not going to do that to you. I will tell you what it means. Res, r-e-s, the thing;

ipsa, i-p-s-a, itself; loquitur, l-a-q-u-i-t-u-r, speaks. The thing speaks for itself. In other words, the doctrine of res ipsa loquitur applies in this kind of a case. There are some states, my own, for example, where the doctrine does not apply, but this is the federal law and it applies in the federal law. I think it applies in the state of Ohio, too.

Mr. Dombey: Yes.

The Court: What does that mean? Does that mean that the plaintiff is entirely absolved from showing negligence? No, but it recognizes, and these states that have this doctrine recognize this: That sometimes you can't prove negligence is in somebody else's possession. You can't prove it. It is there but you can't prove it. Or, it may not be there. I don't say it is necessarily there. Don't understand me as saying that. And so, they have this rule that says, "The thing speaks for itself."

You go down the street and you see a locomotive—I will get away from a locomotive—you see an automobile on somebody's front porch. Now, in Michigan you would have to show the negligence there, you see. But under this rule you don't have to show the negligence, if it answers these three requirements: That the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; third, it must not have been due to any voluntary action or contribution on the part of the plaintiff. Now, that does not mean any contribution at any one time, but as the accident happened.

The Supreme Court of the United States has defined res ipsa loquitur. It means "that the facts of the occur-[fol. 235] rence warrant the inference of negligence, not that they compel such an inference". So you can, from the facts in this case, infer that there was negligence that caused it somewhere. You see, you can infer that. You can infer that the negligence was entirely on the part of the defendant. You can infer from what happened that there was no negligence on the part of the defendant, or you can infer that there was no negligence on the part of the plaintiff.

When you get in there you begin saying, "Well, here is what happened." Nobody saw the bolt break, as I under-

stand, and there is no evidence here whether or not it was a defective bolt necessarily, and there is no evidence one way or the other whether the man who was up above did something he shouldn't have done, by exerting a certain pressure at a certain time. But, you have the right to infer that, or, you have the right to say, "This is entirely due to the negligence of the plaintiff in this case."

I go on with the definition of res ipsa loquitur: "• • • that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that the facts call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict." I don' know how I can explain it to you any better than in the language of the Supreme Court.

What are the facts in this case? The plaintiff was the boilermaker. That is his official title. He was a boilermaker working for this railroad. On this particular day he was engaged under a locomotive in a pit. I permitted the introduction of that picture. Is it here? Everybody seems to want to disown the only exhibit that the court presented, for some reason or other. But, I wanted the [fol. 236] jury to understand how this happened, and I think that you get it better if you see something. Here is a pit that extends about from where the witness was sitting to the back wall. It is about three or four feet deep and about three or four feet wide, railroad tracks on each side. The locomotive would come in. I don't remember whether they said the back end would come in first or the front end. What is that, gentlemen, do you remember?

Mr. Dombey: No evidence on that.

Mr. Alexander: What was the question?

The Court: Whether they backed the locomotive in, or—let me see the picture, please.

Now, this is not necessarily the pit where this accident happened, but it is a similar pit, and it gives you some idea. Well, they bring this motor in, either back it in—and I don't suppose they bring it in under its own steam, I think it is probably propelled in there, so that the boxes are hot, so nobody will get burned.

Now, they had to put in what they call an ash pan. This man was down in the pit. You and I—I think the jury feel the same way as I did about calling that an ash pan. I supposed when they talked about an ash pan that it was about three feet or less than three feet wide and about three feet long. I supposed it was an ash pan just like you did. But, it develops that it is an ash bucket or an ash box. In other words, the ashes fall down. This box is really about three feet deep, isn't it? It is about three or three and a half feet deep. It is narrowed at the bottom than it is at the top. There are two of them. One had been fastened to the fire box up above, and judging from what has been said here, that fire box up there to where they attach the ash pan to the fire box must be about seven or eight feet from the bottom of the pit.

[fol. 237] The plaintiff says this, that they brought in a new ash box. The crane came. It took the ash box off of the end of the pit, brought it down to where he was down below; that up above him in the fire box, which is described as about ten feet—I didn't know there was that much room inside a fire box but nobody disputed it and I take it for granted that is what it is—they had a pull jack. I see there are some people in the jury that know what it is. I know what it is but I never heard it called that before.

Now, here is a man working up there in the box. He attaches the hook and the pull jack pulls it up. In the meantime the plaintiff here bored two holes on the side of this box or ash pan and put a chain across the bottom, as he usually does—I don't think there is any question about that—so that the man inside the box, the fire box, could drop the hook and they would bring it up and bring it into position.

Two men were working on this job, and there is no question but what the man up above was under the supervision of the plaintiff here, but I instruct you now that that does not make any difference because the assumption of risk is not a part of this case. He does not assume the risk of a fellow employee.

He says that he put the chain across the bottom, went up in the fire box to arrange some details with his helper up there. I guess the helper came down and helped move the

ash pan under the fire box so that when they attached the hook they could draw it right up.

All right. Now you have got the ash pan underneath on the floor. You have got the man in the fire box with the pull jack. He lowers the chain, fastens it on to the pull jack, and they hoist this ash pan that weighs about 150 pounds up to position, but it is not quite the way it should [fol. 238] be. So he puts a board—this plaintiff puts a board across the tracks and he gives the signal to his assistant to lower the ash pan down to the board and it rests there. Then he starts to put it up again, gives the signal. He starts to put it up and is guiding it.

Now, he says he isn't under it, and the defendant has a regulation that says you can't be under anything that is being hoisted up in the air and moving. But I say to this jury that not only is there no evidence that he wasn't under it, but it is up to you to determine if he could have done his work in any other way down there in this three-foot pit. He had to be somewhere close to it because he had to guide it. And that is the only testimony here, there is no question about that, it is not denied at all.

The defendant claims that he should have put some blocks underneath it, but there is not one bit of evidence by anybody that that is the way anybody ever did it. The evidence is that this is the way they did it. The man was not under it and so far as this rule is concerned, ladies and gentlemen, I don't think you have to pay a great deal of attention to it under the facts in this case. There is a question in my mind whether it was ever intended to do that, but it certainly is not intended that a rule will prevent a man from working. He was underneath, while he was underneath guiding this, because there are some flanges or edges by which—if this lamp were inverted and you were putting it up, there is a place for bolts around the side; I think he said about ten on each side, about twenty around that entire ash pan—by which these would fasten the ash pan to the fire box. And while he is steering it and getting it ready, a bolt breaks. It comes down. It does not fall on him; it falls against him; and he is pressed up against the wall.

[fol. 239] Now, it is up to you to determine whether or not

they are guilty of negligence, and under the doctrine of res ipsa loquitur they don't have to prove to you where the negligence lies, I mean the exact nature of the negligence. You can, from the thing itself, determine if there was negligence and what the negligence was; that is, unless it has been rebutted by some testimony here of the defendant.

If you arrive at the decision in your own mind that this accident happpened under these instructions, due to the negligence of the defendant, and the negligence of the employee up above who was out of the immediate control of the man below—I don't mean immediate control, but, anyway, he is a fellow employee, his negligence would be the negligence of the defendant railroad in this case, if he is negligent. Now, if you say, "I can't say that they were negligent. I can infer that they were negligent, but I can also infer that it was an accident." I think reasonably in this case you can either say this. If you find negligence, that it was due to the bolt breaking or it was due to something happening up above, if you find negligence on the part of the defendant, you can infer that negligence, as I stated, unless it is rebutted.

All right. When you have found that there was negligence, if you have—now, don't understand me to say because I say "when you have found." I should not have said that. If and when you have found that there was negligence, then it is up to you to see whether or not there was contributory negligence, and then apply the rule of comparative negligence as I have outlined to you. And, I don't think it is necessary to go into it again.

Now, what does the plaintiff claim in this case? He claims that he was hurt. There isn't any doubt but what he was hurt at that time. I mean by that, he had a broken [fol. 240] nose and he was scarred up and blood, and all that. There is no question about that. But, if you arrive at a verdict in favor of the plaintiff, he certainly would be entitled to something for the pain and suffering of that very day. But the plaintiff says more than that. They said that this man suffered an injury to the eighth dorsal vertebra of the dorsal region, which is the movable part of the back, the most movable part of the back. All of it is movable. And that as a result of this accident the man is 50% to 60%

disabled and will be the rest of his life, and they brought testimony in here to that effect. That is the serious part of the case, so far as damages is concerned.

On the other hand, the defendant brought a doctor here who was the man that attended him, who said that they made the X-rays the very day of the accident, and the X-rays showed that this injury that he complains of today he had at that time. That is what Doctor Pickett said. That is not disputed; it is not disputed that the man has that injury; the extent of it, however, is disputed. I have forgotten the medical term that they used—oh, yes, a compression fracture.

Now, Doctor Pickett, who was the company doctor, had some other X-rays taken about three or four months later, wasn't that it, from June to September, and Doctor Pickett got reports from these two doctors. The court permitted that testimony when they brought the hospital record here, and under any circumstances, I think, the court should have permitted it. But, one of those doctors, I have forgotten which one, said that while he thought it was an old injury, he would not rule out some other theories, that it was not an old injury. And the other doctor, as I remember, sat on the fence, I think, even more than the other. Isn't that true? So you have got plenty of evidence here [fol. 241] that it is an old injury and not something that happened then, and you have testimony that shows that you can't rule out entirely that it was not an old injury. In other words, this jury can find from the testimony here, depending upon which you believe, with the knowledge that this man admits that in '45 or '46 he did suffer an injury, that he has been off the railroad at different times since, but that he was doing his work at that time and had been on the job for some time. You take it all into consideration.

Now, when the point of damages arrives—and when I talk of damages that does not necessarily mean that I think he should recover damages, but it is like when you say, if you find the defendant guilty or not guilty, you have got to say one or the other. So I say, if you find the plaintiff is entitled to damages, then you set the damages, not to punish the railroad company at all, or not because it is a railroad company, but to compensate him for what he has

suffered and what he will suffer, and the fact that he will continue to be unable to support himself, as in this particular job on the railroad, according to the testimony here. But on that there is a difference of opinion, too. You saw the witnesses. It is up to you to determine those questions.

The court at this point also charges you that you may treat the acts of any agents or employees of the defendant corporation other than this plaintiff done within the scope of their employment as agents of the defendant corporation, since the corporation can act only through its agents and employees.

Now, there has been no evidence introduced concerning medical or hospital bills incurred by the plaintiff to date, but as I stated, the plaintiff if he is entitled to recover may recover for medical, hospital bills, as the evidence may show that it is reasonably certain he will incur in the future.

[fol. 242] If you find that the plaintiff has proved by a preponderance of the evidence that the defendant was guilty of negligence, as I have defined it to you, and if you find that he is free from contributory negligence, and if not, you apply the comparative negligence rule, and you arrive at the point where you are determining the damages, the measure of recovery should be strictly limited to compensatory damages which the plaintiff may have shown to exist by a preponderance of the evidence, but in no event is his recovery to exceed the amount prayed for in the complaint; that is, $60,000.

Now, the danger of mentioning something like that, the juries may get the idea, "Well, they said $60,000, and if he can recover that's what he can recover." I do not say one way or the other. I mention the amount because that is the maximum. In arriving at the amount of damages you will determine what will be required to fully compensate the plaintiff for his loss of wages, if any, in the past. There is no evidence about this compensation except that he got it. There is no evidence of the conditions of it, or anything else. You will determine what will be required to fully compensate him for his impaired efficiency as a wage earner in the future, if such be the case, and for his pain and suffering. There is no humiliation that I can

think of, except where a man is physically unable to do a whole day's work. If that is what is meant by humiliation, yes. Both in the past and what may be reasonably anticipated in the future.

You should consider, also, the present worth of a lump sum settlement as it is now available for future medical exenses or future loss of wages. In other words, if you find by a preponderance of the evidence the plaintiff should recover medical expenses and loss of wages which are reasonably certain in the future by making a lump sum [fol. 243] award at this time, the plaintiff will have that money available before he would have earned it, or before medical bills are incurred, and plaintiff can keep that portion of any award at interest. You may, therefore, consider these circumstances in arriving at the amount of your verdict.

Also, as I have heretofore instructed you, if you find by a preponderance of the evidence the defendant was not guilty of negligence which was a direct and proximate cause of the injuries to plaintiff, and you also find that negligence of the plaintiff contributed to his injuries, your verdict shall be for an amount representing the total amount of damages reduced by an amount in proportion to the amount of negligence if any, attributable to plaintiff.

As you have been heretofore instructed, you are the sole judges of the facts in this case, and you should be jealous of your prerogative in that respect. Neither in this charge, nor in any word uttered, or remark made during the trial—and I say that these young gentlemen are evidently very good lawyers. It was difficult on both sides, it is kind of difficult for the court, and after you analyze it and get back there it is difficult to decide. I mean by that, it is difficult for us to put it in the language that is fair. It is difficult for them. But I think they have done an admirable job of presenting their case and particularly in thir argument.

Neither in this charge, nor in any word uttered, or remark made during the trial, does, or did, the court intimate or mean to give, or wish to be understood as giving, any opinion as to the facts of this case. It is solely and exclusively for the jury to determine what the facts are and this you must do from the evidence in this case.

The Court reminds you that this is a case in Federal court. Some of you may have served as jurors in a state court where the concurrence of only nine jurors is required. [fol. 244] Here there must be a concurrence of all the jurors before there can be a verdict. In other words, all twelve jurors must agree. On that, while the verdict reached must be your verdict, you should listen to what the other fellow has to say. If you go in there determined "it is going to be my way or there isn't going to be any verdict," that is wrong. You go in there and you listen. Give the other person the same credit for being as sincere as you claim for yourself. Listen to both sides, then make your determination. If, for example, there are many more for the plaintiff than for the defendant and you are on the side of the defendant in this case when you get in there, you say, "Now, wait a minute, what is there that appeals to them that I can see at the present time. Let me hear their argument." Listen to them. Or, if there are many more for the defendant than for the plaintiff, and you are on the other side, listen to what the defendant's people have to say. In other words, listen to each other all the way through and then make your determination. Don't compromise. It must be your verdict at the finish.

Are there any exceptions on the part of the plaintiff?

Mr. Dombey: No, your Honor.

The Court: Any exceptions on the part of the defendant?

Mr. Dombey: Just as a matter of record——

The Court: Are there any specific exceptions?

Mr. Dombey: No specific exceptions.

The Court: Any specific exceptions on the part of the defendant?

Mr. Alexander: We would like to be heard, your Honor.

The Court: I will excuse the jury for the time being.

(The jury retires to the jury room.)

The Court: Do you have some exceptions?

Mr. Alexander: Yes, sir.

[fol. 245] The Court: May it appear on the record that neither the plaintiff nor the defendant offered this court or presented this court with a single instruction before the arguments, and that the court yesterday suggested or di-

rected their attention to the fact before all arguments no instructions had been presented to the court at all.

All right.

Mr. Alexander: May we also let the record show in that regard that the defendant rested in the early part of the afternoon and opening statements were then made, and defendant's counsel were of the opinion that the jury would be charged after arguments.

The Court: When was the jury charged?

Mr. Alexander: They are being charged this morning.

The Court: When were the arguments completed?

Mr. Alexander: This morning.

The Court: When should I charge them, next week, or should I have charged them last night before the plaintiff had an opportunity to complete his argument?

Mr. Alexander: We should have presented our requests to charge to the court before argument.

The Court: Yes. I don't quite see your point. I charged the jury when you got through arguing. Do you take exception to that?

Mr. Alexander: No, sir. If the court please, the practice has been to inform counsel that they would be permitted to deliver special requests to charge.

The Court: Don't you know that without the court——

Mr. Alexander: That's right.

Mr. Dombey: Your Honor, I am only making this statement for the purpose of the record. Judge Underwood heretofore requested the special charges even at the outset of the trial, and your Honor had requested instructions [fol. 246] yesterday. You said if we had any to get them before argument.

The Court: As a matter of fact, that is required in the rules, isn't it?

Mr. Alexander: It is required in the rule that they be presented before argument.

The Court: I don't quite see what exception you take to the court.

Mr. Alexander: I was just making the record straight.

The Court: Where wasn't it straight before?

Mr. Alexander: I am willing to skip it.

Mr. Alexander: Now, the defendant, Baltimore & Ohio

Railroad Company, takes exception to submitting the amended complaint to the jury without withdrawing from the complaint the following allegations in the amended complaint.

Mr. Dombey: Your Honor, those motions were made yesterday.

The Court: Let them make them again. I want them to protect the record.

Mr. Alexander: I will just renew my objections.

The Court: That may be the practice here.

Mr. Dombey: Nothing has transpired in the record that would alter the situation in any way, and they have raised all those objections and the court has ruled on them.

Mr. Alexander: Now, your Honor, an issue is being submitted to the jury by leaving this language in the amended complaint that is not in the case.

The Court: You heard me say that the pleadings were not part of the evidence.

Mr. Dombey: Your Honor, I at least rise to a point of order. The court wanted to know whether or not there were any further instructions that either side had. Now, [fol. 247] he is going about motions and issues. This court has charged the jury.

The Court: What are your exceptions? I am going to limit you to the exceptions or instructions that the court should have given, and if the court has overlooked anything I shall be very happy to make the correction.

Mr. Alexander: Note the exception.

The Court: I followed one of Judge Underwood's charges most of the time. You have got to take the facts as they appear from the evidence and I think I presented both sides.

Mr. Alexander: On the charge in regard to medical expense, your Honor, there is no evidence of any medical or hospital expense in this case to date, of any expense to date, and there is no evidence that there will be any medical or hospital expense in the future.

The Court: What do you say to that?

Mr. Dombey: There is no evidence, and the court has so charged the jury, up to the present time. It is within the province of the jury and the nature of the accident, to

determine for themselves. There is evidence he has a permanent injury. No one can predict with any definiteness what the medication is going to be.

The Court: That is what I thought.

Mr. Dombey: No one could. That is within the province of the jury.

The Court: I said the plaintiff is entitled to recover for such medical and hospital bills as the evidence may show that it is reasonably certain he will incur in the future.

Mr. Alexander: I want to make our exceptions because there is no evidence of any future medical or hospital expense here.

The Court: I don't say there is, or I don't think there is. [fol. 248] Mr. Alexander: What you got over into your lump sum amount that they could award, that they might take into consideration medical expenses and hospital expenses that he might incur in the future.

Mr. Dombey: That is absolutely correct.

Mr. Alexander: There is no evidence on that.

We wish to except to the court's charging the jury that Rule 86 was not violated and for charging with reference to Rule 86.

The Court: Overruled. I think I explained that as much as it could be. There is not one bit of evidence in this case that this man was underneath at the time of the accident.

Mr. Alexander: Except to the court's failure to charge on the standard of care of the railroad with reference to purchase and use of bolts.

Mr. Dombey: There is no evidence on it. It wouldn't be proper.

The Court: I agree with you, there isn't. I don't even know whether this bolt was purchased by the railroad. For all I know, the foreman that had the man come back to work when he knew he wasn't physically able—and you notice the court didn't even present that—might have brought those bolts out there. He wanted to cater favor with the railroad, evidently. He might have done that, for all I know.

Mr. Dombey: I insist that you use this apple shiner in your charge.

The Court: It is too late now.

Mr. Alexander: We except to the charge of the court on the rule of res ipsa loquitur, because this is not a case that involves that rule of evidence.

The Court: All right. Overruled.

[fol. 249] Mr. Alexander: Except to the court's charge—no place in the court's charge was there a statement that "if you find that the plaintiff was guilty of sole negligence, then you must find for the defendant, the Baltimore & Ohio Railroad."

The Court: I thought I did. But, I shall certainly make that clear. I thought I did.

Mr. Alexander: Except to the court's charge in reference to plaintiff's disability at between fifty and sixty per cent. If the court please, the only doctor that mentioned up to 60 per cent disability was Doctor Ridgeway, who in no way could tie this condition that he found to this accident of June 22, 1948. The most that Doctor Clybourne spoke about was a 50 per cent disability.

Mr. Dombey: Now, your Honor, I rise again to conform with the evidence. Doctor Clybourne testified that he was 100 per cent disabled for railroad work and 50 per cent disabled for all types of work. Doctor Ridgeway set the percentage, and he has argued this one point six times. Now, I think there ought to be a statute, not of limitation——

The Court: Statute of repetition.

Mr. Dombey: —on the number of times you can argue the same point.

Mr. Alexander: Further except to any charge on the extent of disability because of the evidence.

The Court: Denied.

Mr. Alexander: Except to the charge in reference to mentioning damages for humiliation.

The Court: I thought I explained that.

Mr. Dombey: You did.

Mr. Alexander: You went back and forth.

The Court: All right, I will fix that. If you don't think I have done that fairly, I certainly will change it.

[fol. 250] Mr. Dombey: Your Honor, I don't think it is necessary to emphasize that again. Here is what the court said, that if the failure to do a day's work is some humiliation they could consider that.

The Court: In order to make sure I may correct that. I will not deny that at this time.

Mr. Alexander: The defendant excepts to the court's charge when he is defining ordinary care of the plaintiff, when he says that the plaintiff cannot go ahead blindly. Now, that is not my interpretation of ordinary care. You talk about ordinary care and then you talk about him going ahead blindly.

Except to the charge of the court in stating to the jury that sometimes you can't prove negligence.

The Court: What do you say to that?

Mr. Dombey: I think the court's charge covered everything about as completely as I can. I don't believe, your Honor, that it is fair to pick out a little sentence here and a little word here and then emphasize it at the latter part of your charge.

The Court: I will take care of it now. As a matter of fact, I think that that part in there where I said the plaintiff can't go ahead blindly is more—I expected you to object to that, not them. But, they have objected to it and it is coming out.

Mr. Alexander: Object to the court's charge with reference to the illustration given on res ipsa loquitur; the automobile on the front porch certainly has no application to this case.

The Court: The court tried to describe the difference between this kind of a case and a case where there is no res ipsa loquitur. I will have to tell them that this is not [fol. 251] an automobile case, which the court will be glad to say, if you want me to do that. Do you want me to say that the defendant objects to that?

Mr. Alexander: I think that all remarks to this case having any similarity to a case of that type——

The Court: I did not say that.

Mr. Alexander: I mean a case of that type illustrating the doctrine of res ipsa loquitur with this case illustrating a case of res ipsa loquitur.

The Court. What did you say about you can't prove what?

Mr. Alexander: I said, you said in your charge that sometimes you can't prove negligence.

Mr. Dombey: Which is absolutely proper. That is why you have res ipsa loquitur.

Mr. Alexander: You stated in your charge, your Honor, and we are objecting to it, that there was no evidence of a defective bolt in this case, and no evidence that the helper, Jaynes, exerted too much pressure, but then you went ahead and said that "you have the right to infer that."

The Court: There is no direct evidence about a defective bolt, is there?

Mr. Alexander: No, but is there any right on the part of the jury to infer that there was a defective bolt?

The Court: Yes.

Mr. Alexander: Note *your* exception.

The Court: I didn't limit it to that, either, because there would be another case where the plaintiff ought to object.

Mr. Alexander: Now, in the comment on the evidence, your Honor, you stated, in referring to Jaynes, that he attached the pull jack. The evidence was, I believe, that they both attached the pull jack.

[fol. 252] The Court: I will put that very important point before them.

Mr. Alexander: We object also to the court's comment on the evidence that when he referred to the helper, Jaynes, as assisting the plaintiff and under his supervision, where the court said, "That does not make any difference that Jaynes was working under plaintiff's supervision."

Mr. Dombey: Which is exactly the correct statement of law, and we insist that that stand.

The Court: Denied.

Mr. Alexander: Object to the court's commenting on the evidence when he says that the plaintiff was not standing under the ash pan.

The Court: Is there any evidence that the plaintiff was standing under the pan?

Mr. Alexander: Yes, your Honor. He had his hand on the pan.

The Court: He was holding the pan, directing it. There is not one bit of evidence. Denied.

Mr. Alexander: Object to the court's commenting on the evidence where he says that he didn't see how, or words to

that effect, the plaintiff could have performed this work in any other manner.

The Court: The court has a right to make that comment.

Mr. Alexander: We are objecting. And we are also objecting to the comment that the pan fell against him and not on him.

The Court: Is there any evidence that it fell on top of him or against him?

Mr. Alexander: His whole face was injured.

The Court: Yes, it came up against him that way and that is the only evidence in the case at all.

Mr. Alexander: When is something on a person or against them?

[fol. 253] The Court: Well, according to you, the hoist has to be up above. The court is satisfied. I won't change that.

Mr. Alexander: We also object to the court's charge on res ipsa loquitur where the court states that they don't have to prove negligence.

The Court: I didn't think that I said it that way.

Mr. Alexander: Could we read the court's charge in that respect?

The Court: I said all the way through that they must prove it, but in this kind of a case that proof may be inferred.

Mr. Alexander: Note our exception.

The Court: I will change that if I said they don't have to prove negligence. I didn't intend to say that.

Mr. Dombey: Your Honor did say that, and I don't think it is fair to go ahead and repeat things that he wants repeated to emphasize to the jury.

Mr. Alexander: You know, Mr. Dombey, if I don't make my objections to the charge right now, I will never have another chance to make them.

Mr. Dombey: We are willing to risk on that, your Horor.

Mr. Alexander: Now, we object to the court in his commenting on the evidence referring to the negligence of the helper Jaynes, because there was no evidence offered that he was in any way negligent.

The Court: I don't remember that I ever said that Jaynes was negligent at any time.

Mr. Alexander: I have it written down in my notes.

The Court: I don't care what you have got written down. You can write anything down you want to. I don't remember that I ever said that Jaynes was negligent, but they can infer that he was negligent. Do you doubt that, in a case of res ipsa loquitur?

[fol. 254] Mr. Alexander: I say that this is not a res ipsa case.

The Court: I know that. I have held against you on that.

Mr. Alexander: Object to the comment of the court on a medical report written by Doctor Piatt and a Doctor Erhard.

The Court: Denied.

Mr. Alexander: We are objecting to the court's commenting on Rule 86, when he stated to the jury that he did not think that Rule 86 of the Baltimore and Ohio Railroad was ever intended to apply to a situation such as was presented by this case.

The Court: I didn't say that, because you are stating only half of what I said.

Mr. Alexander: I am willing to go back and see what it says, your Honor.

The Court: What I said to them was this, "But you may consider that it does apply to this." I was very careful about that, because, as a matter of fact, Mr. Lewis and I discussed it the other day.

Mr. Alexander: You are satisfied with your charge in that regard?

The Court: I don't care to have counsel make a statement about what the court said if it isn't in there. It is just like taking half of a man's sentence.

Mr. Alexander: If the court please, you know we had to take quick notes. We are not saying it word for word.

The Court: I know it, but you can't pick out one-half of what the court said and say, "You said that," without putting it all in.

Mr. Alexander: Note our exception.

The Court: I want you to look that up, if you can, because I think that is a deliberate attempt on the part of the railroad defendant to reargue its case.

[fol. 255] Mr. Alexander: No, it isn't, your Honor.

Mr. Dombey: Let these objections be made, but Mr. Alexander insists on arguing everything.

The Court: All right.

Mr. Alexander: On the question of damages, on the loss of wages, the evidence was offered as to his monthly pay but no showing of what his loss of wages are.

The Court: Overruled— I think I will impress that, if you want me to impress that on the jury. How much was he making?

Mr. Dombey: $14,600. $300 a month.

The Court: He has lost how much?

Mr. Dombey: Four years.

Mr. Alexander: There is no testimony—

The Court: You have objected that I haven't told them about the damages, and I am going to tell them.

Mr. Alexander: If you tell them $14,000, in my humble opinion that will be a terrific error.

The Court: In your humble opinion everything the court said was a terrific error.

How much did he lose? He wants me to—

Mr. Dombey: I told the jury it is $14,400 in past loss of earnings, not counting the increases that were granted in the meantime.

The Court: Of course, you can't guess on the increases. I don't know what they are.

Mr. Dombey: I want the record to show, your Honor, that this is made at the request of defendant's counsel.

The Court: It is. And, how many years?

Mr. Dombey: Four years.

The Court: At $300. There is no evidence I can submit on the increase because there is nothing before the court.

Mr. Alexander: Now, your Honor, the record shows that he worked until September 9, 1949.

[fol. 256] The Court: I will take care of that. I think you are entitled to show that he worked until then.

Mr. Alexander: There is no evidence that there is a total loss of wage here, either. The most they say is 50 per cent disability.

The Court: September 7, 1949. I didn't want to emphasize the damages, but if the defendant insists on my doing it, I shall have to do it.

Mr. Alexander: We are insisting on the charge being——

The Court: What are your other objections?

Mr. Alexander: I believe that is all.

The Court: All right.

Mr. Alexander: Thank you for permitting me to go through these objections.

The Court: You have that right.

What about this evidence of future medical expense? That bothers me to some extent. In the event you got a verdict it might possibly upset it.

Mr. Dombey: Well, your Honor, we are willing to take that chance, on this ground. There was evidence of development of arthritis, and you have got a permanent injury, and, therefore, when you have that and a development of arthritis, it is up to the jury to determine from the evidence what they feel——

The Court: Wouldn't they have to guess at it?

Mr. Dombey: Not the way the court put it. The court said what the evidence reasonably shows. If it doesn't show anything, all right.

The Court: All right.

Recall the jury.

(The jury returns to the jury box.)

[fol. 257] The Court: Ladies and gentlemen, the court's attention has been directed to some statements in the charge that might have been misleading, and although I do not feel that all of them have been misleading, possibly some of them have. As a matter of fact, I don't feel any of them have been misleading, or wrong, but I do feel that they ought to be clarified so that there be no question about it.

Now, you remember, I tried to give you an example, tried to show the difference between this kind of a case where I feel the doctrine of res ipsa loquitur applies and one where it does not, and I gave you a situation of an automobile running up on a front porch. Well, there is no automobile in this case, ladies and gentlemen, and there is no front porch, so far as I know. I just tried to give you an example. So, you can forget the automobile on the front porch as though I never said it to you at all. You can forget it entirely.

Mr. Dombey: I think it should show where that request came from.

The Court: I don't think that that is necessary under the circumstances.

Mr. Alexander: (Out of the rearing of the jury) If the court please, on account of that remark I would like to move that a juror be withdrawn because of Mr. Dombey's remark, and the case continued.

The Court: Denied.

The Court: Now, I told this jury that this Rule 86 was not applicable, but I thought I also told the jury at the time that if you determine that it is, it is up to you. I don't think it is applicable because I don't think it could possibly apply to this kind of a job that anybody had to do, but if you think it does, that is up to you. And, I don't think that there is any evidence about him being directly [fol. 258] under this at any time, and surely not at the time of the accident; directly under. I am under that light that is way over there, or this light. I am not directly under it, and that is what I said. I intended to say there is no evidence of his being directly under.

I thought I told you this, but because I bring it to you now means no particular significance. I thought I said, as I said about the defendant, that if you found that the defendant was solely to blame for the accident and that the negligence was proven and all that, then you would find for the plaintiff. I intended to, and I am sure this jury got the idea, and if you didn't I tell you now, that if you find that the plaintiff was solely to blame for the accident, you find for the B. & O., the defendant railroad. I thought I had taken care of that.

Now, there is a question of humiliation here. The word was used. It happened because I was quoting from another charge. I think that you understood the limitation I put upon humiliation, and that is the humiliation that comes when a young man, a comparatively young man, fifty, is unable to do a full day's work at his job. That is all. That is a humiliation. I don't think that there is any other humiliation, and personally, I don't think that's a great deal of humiliation, either.

I also perhaps did mention something to the effect that

the plaintiff couldn't blindly go ahead. I did that after I had given you the definition of ordinary care. If the defendant's conduct came up to that standard of care which in law is called ordinary care, it was not negligent and it is not liable to this plaintiff no matter what damage resulted from such conduct. That is a repeat of what I just said; if they are not negligent he can't recover from them. But, it is in again. If his conduct fell below such standard [fol. 259] of care then it was negligent, and if such conduct was the direct and proximate cause of the damages complained of, then the plaintiff may recover. Likewise, the plaintiff is required to exercise that degree of care for his own safety that is required of the defendant; that is, ordinary care. And, forget the "blindly" part. I was just trying to emphasize something. I realize that sometimes you emphasize and give the wrong impression. The definition of ordinary care is what I want you to follow.

My attention has been directed to the fact that the evidence shows that both of them attached the hook from the pull jack to the bottom of the ash box. I don't know whether that is so important or not, but it has been requested, and if it is true you can take that for granted. I don't know what difference it makes. I don't remember just how is was. Anyway, there isn't any question but what the hook got attached to the pull box, whether the plaintiff did it alone or whether the plaintiff and defendant did it together.

Remember that I have said all the way through that the plaintiff must prove the negligence, but in a case of this kind you may infer negligence if you believe that the facts so warrant.

Now, the court said it couldn't see how this man could have performed his work in any other manner. If you jurors think he could, from the evidence as you know it, that is up to you and you are not to be biased by what I think the facts show at all. You are the judges of the facts, not me. The evidence, of course, in some cases is really, perhaps, more complete, but that is what makes, in my opinion, this case a case of res ipsa loquitur. Let the thing speak for itself.

I think I have taken care of everything except the dam-

ages. You heard the evidence on damages, and I think that [fol. 260] he did work and get paid up to September 7, 1949, and that, I think, the claim of the plaintiff is that up to this time he lost $14,400. Now, whether that is true or not is up to you to determine. I think it showed that he was getting $300 a month; is that right?

Mr. Dombey: Yes, your Honor.

The Court: And that there have been some increases, but I instruct you, you are not to pay any attention to the increases because I don't know what they are, and neither do you. But, $300 a month is the figure that you would take into consideration and the years that have been outlined, and the percentage of disability covering those years. I give you those figures without building up anything at all, but the matter of damages is for you, taking everything into consideration.

All right. Any other exceptions?

When you retire you will elect a foreman who may be either a lady or gentleman. When you arrive at a verdict, he or she will sign the form where the word foreman is printed. Then the other eleven jurors will also sign. You do away with polling the jury in that way, is that right? Two blank forms of verdict will be handed you and I do not think you will have any difficulty in using the blank which is in accordance with your verdict. When you have reached a verdict you will inform the bailiff who will inform the court.

How about the pleadings? Do you want the pleadings to go to the jury?

Md. Dombey: We are not insisting on them.

The Court: All right.

The Court: All the exhibits you may take with you if you so disire.

Mr. Alexander: If the court please, may I approach the bench?

[fol. 261] (Out of the hearing of the jury.)

Mr. Alexander: We object to the Court's charge on the question of damages because there is no proof of the

amount of loss of wages. Mr. Dombey's argument to the jury, which is not evidence, gives loss of wages of $14,000.

Mr. Dombey: The jury has the evidence, your Honor.

The Court: May it appear on the record that the instructions about damages was made at the request of the defendant.

Mr. Alexander: Exception. Further object to the charge of the court to the effect that he thinks this is a res ipsa loquitur case and it speaks for itself.

The Court: Did I say that?

Mr. Dombey: The court charged fully on that subject.

The Court: I am charged with saying to the jury that this is a res ipsa loquitur case and the thing speaks for itself. What I said was the words res ipsa loquitur means the thing speaks for itself. I thought I made that plain. I have said that I don't know how many times. I took each word and separated it. The thing, res; ipsa, itself; loquitur, speaks, and that is the doctrine that I think applies to this case.

Mr. Alexander: You don't mean to say you think that this accident speaks for itself?

The Court: I think I have made it plain to the jury.

Mr. Alexander: Exception.

The Court: I certainly didn't say what the court is charged with saying.

(Before the jury.)

The Court. May they accept a sealed verdict in the event the court is not here?

Mr. Dombey: Yes, we will agree.

[fol. 262] Mr. Alexander: We will agree.

The Court: All right, it is agreed that a sealed verdict may be taken.

Ladies and gentleman, when you go to lunch please be careful about talking about the case. You can talk about the judge all you want—I am leaving town anyway—and you probably can find a lot to talk about, and I don't want to be around when you are doing it. But, don't talk to each other about the case, and don't discuss it, and don't permit anybody to talk to you about it.

If it happens that I am not here when you get ready

with your verdict, Mr. McCarty will tell you whether I am available or not; if I am not, you will take the verdict, put it inside an envelope and seal it up.

All right.

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[fol. 263] PLAINTIFF'S EXHIBIT 3

OPD 537CC
Francis O'Neill

Dr. Pickett
4-2-49 10:05 a. m.

Re-check X-ray of back:

Examination of the dorsal vertebrae in the ap and lateral projection spotting over the 8th dorsal vertebrae again shows the compression fracture of the body of the 8th dorsal which apparently is of approximately the same amount of compression anteriorly than was noted on the previous film study. The only film actually available for comparison was one made on 6-22-48 at which time the compression was noted the compression at this time is more marked than was seen on the original film study but from the reports of the previous film studies with the films not available it appears that there is no further narrowing since the posterior aspect of the 8th dorsal measures approximately 30 mms. while the anterior margin measures approximately 16 mms. The irregularity also is somewhat diminished since the last study.

[fol. 264] PLAINTIFF'S EXHIBIT 4

Newark City Hospital
Nurse's Record

Case No. OPD1638BB. Telephone 5067.
Name Mr. Francis G. O'Neill. Address 29 Webb st.
Adm. 9-9-48.
Referred by Dr. Pickett.

Occupation Boiler Maker. B. & O. Nationaltiy Am. Religion Cath. Age 44. M.(S.)W.—(M.) F.
Admitted for X-ray of spot films over the 8th dorsal vertebrae.

September 9, 1948
X-ray #5454 B & O

Case of: Francis G. O'Neill.
X-ray of: Spot films over the 8th dorsal vertebrae.
Ref. by: Dr. Pickett.

Findings: Examination of the mid and lower dorsal spine in the AP and lateral projections reveals the previously described compression fracture of the 8th dorsal vertebrae with what appears to be slight loss of the disc space between D-7 and D-8. Since the old films are not available for comparison it is difficult to state whether there is any further compression than on the previous film study. The anterior margin of the 8th dorsal vertebrae measures approximately 16 mms while the posterior margin measures approximately 30 mms so that marked irregular wedging is noted. There also appears to be slight narrowing of the anterior left lateral aspect of the 6th dorsal vertebrae with approximately 5 mms distance between the anterior and posterior aspect of the body of this vertebrae.

Conclusion: Compression fracture of the 8th dorsal vertebrae with what appears to be a lesser fracture of the 6th [fol. 265] dorsal vertebrae. The exact period of duration of these injuries cannot definitely be stated since the old films are not available for comparison.

Gerald A. Erhard, M.D.

GAE/ew

PLAINTIFF'S EXHIBIT 5

June 22, 1948
X-ray #5041 B & O

Case of: Francis G. O'Neill.
X-ray of: Upper thoracic ribs and dorsal spine.
Ref. by: Dr. Pickett.

Findings: Examination of the upper thoracic ribs fails to visualize any radiographic evidence of recent fracture of the ribs posteriorly on the left side.

Further examination of the dorsal spine reveals compression of the body of the 8th dorsal with anterior wedging. The height of the vertebrae has been reduced approximately one third. One can note condensation paralleling the superior surface of the body of the 8th dorsal which suggests the fact that this may be an old injury, however one cannot rule out a telescoped on the body of the 8th dorsal. There can also be seen slight sharpenings at the margins of the bodies of several of the other thoracic vertebrae. The intervertebral space between the 8th and 9th dorsal seem to be slightly widened. There is also suggestive widening between the bodies of the 5th and 6th. The intervertebral foramina appear normal. There is slight increase in the dorsal kythosis on the mid thoracic vertebrae.

Conclusion: Radiographic findings reveals a compression of the body of the 8th dorsal which may be an old [fols. 266-280] injury. No evidence of further boney fracture of the dorsal vertebrae or the upper thoracic ribs can be ascertained.

Arnold D. Piatt, M.D.

ADP/ew

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IN UNITED STATES DISTRICT COURT

VERDICT—Filed May 14, 1952

We, the jury, herein do find the issues joined in favor of the plaintiff and assess his damages at $32,000.

Signed, M. Grove Davis, Foreman.

(Signatures of jurors omitted.)

In United States District Court

Motions of the Defendant for Judgment in Accordance with Motion for Directed Verdict and in the Alternative for a New Trial—Filed May 21, 1952

The defendant, having made a motion for a directed verdict at the close of all the evidence, now moves that the court set aside the verdict of the jury in favor of the plaintiff and against the defendant in the amount of $32,000.00 and the judgment entered thereon and for the entry of judgment in accordance with its motion for a directed verdict on the following grounds:

[fol. 281] In United States District Court

Order Denying Directed Verdict—Filed July 30, 1952

The motion for a directed verdict in favor of the defendant is hereby denied.

Motion for a new trial, however, is hereby granted, unless the plaintiff files a remittit damna of all over the sum of twenty-two thousand ($22,000.00) dollars on or before September 1, 1952.

Frank A. Picard, United States District Judge.

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[fol. 282] In United States District Court

Remittitur—Filed August 15, 1952

The plaintiff in the above entitled cause does hereby, before the specified date of September 1, 1952, file this, his remittitur, of all damages in excess of the sum of twenty-two thousand dollars ($22,000.00).

Herbert & Dombey, Alex S. Dombey, Attorneys for Plaintiff.

In United States District Court

Order Overruling Motion for New Trial—Filed September 8, 1952

This matter came on for hearing on the motions of defendant for a directed verdict in favor of the defendant, or in the alternative for a new trial.

The court upon consideration finds that the motion for a directed verdict in favor of the defendant is not well taken and should be, and hereby is, denied.

The plaintiff having filed in this cause his remittitur of damages in the excess of the sum of twenty-two thousand dollars ($22,000.00) before September 1, 1952, the court finds that defendant's motion for a new trial should be, and hereby is, denied.

Underwood, United States District Judge.

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[fol. 283] In United States District Court

Notice of Appeal—Filed September 12, 1952.

Notice is hereby given that The Baltimore & Ohio Railroad Company, defendant above named, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the final judgement entered for the plaintiff in this action on the fourteenth day of May, 1952, for the sum of $32,000.00 and remitted by the trial court to the sum of $22,000.00, said remittitur having been duly accepted by the plaintiff.

Alexander, Ebinger & Wenger, Arvin J. Alexander,
Attorneys for Defendant-Appellant.

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In United States District Court

Statement of Points—Filed September 12, 1952.

Pursuant to Rule 75 (d) of the Federal Rules of Civil Procedure, the appellant hereby states the following points upon which it will rely on appeal:

1. The court erred in refusing to direct a verdict in favor of the defendant.

2. The court erred in refusing to set aside the verdict of the jury in favor of the plaintiff and against the defendant and the judgement entered thereon in accordance with its motion for a directed verdict.

3. The court erred in overruling defendant's motion to strike all of the testimony of Dr. Joseph Ridgway from the record and to admonish the jury to disregard said testimony.

[fol. 284] 4. The court erred in overruling defendant's motion to strike all of the testimony of Dr. Harold E. Clybourne from the record and to admonish the jury to disregard said testimony, except as said testimony pertained to injury to the eighth dorsal vertebra.

5. The court erred in permitting Dr. Ralph E. Pickett, over defendant's objection, to read to the jury a medical report prepared and signed by Dr. Arnold D. Piatt.

6. The court erred in permitting Dr. Ralph E. Pickett, over the defendant's objection, to read to the jury a medical report prepared and signed by Dr. Gerald A. Erhard.

7. The court erred in admitting into evidence, over defendant's objection, a medical report prepared by Dr. Arnold D. Piatt, being Plaintiff's Exhibit 5.

8. The court erred in admitting into evidence, over defendant's objection, a medical report prepared by Dr. Gerald A. Erhard, being Plaintiff's Exhibit 4.

9. The court erred in overruling defendant's motion to withdraw from the consideration of the jury the following allegation contained in paragraph number 3 of the amended complaint and being:

> "that during the raising and holding operation the said hoist was under the exclusive control of the said Jaynes."

10. The court erred in overruling defendant's motion to withdraw from the consideration of the jury the following allegation contained in paragraph number 3 of the amended complaint and being:

> "Plaintiff further says that at all times herein the said Jaynes also controlled and manipulated the ash pan by means of steel bar which the said Jaynes used

to pry the sides of the said ash pan and thereby move it into place."

[fol. 285] 11. The court erred in overruling defendant's motion to withdraw from the consideration of the jury the following allegation contained in paragraph number 4 of the amended complaint and being:

"During the repair operation hereinbefore described defendant corporation negligently caused and/or permitted the metal bolt holding one side of the ash pan to the chain hoist to break."

12. The court erred in overruling defendant's motion to withdraw from the consideration of the jury the following allegation contained in paragraph number 5 of the amended complaint and being:

"and spondylitis of the spine in the dorsal and lumbar area, and a traumatic arthritis in the injured areas of the spine."

13. The court erred in permitting counsel for the plaintiff, over defendant's objection, at the conclusion of defendant's case to amend paragraph 4 of the amended complaint as follows:

From:

"During the repair operation hereinbefore described, defendant corporation negligently caused and permitted the metal bolt holding one side of the ash pan to the chain to break."

To:

"During the repair operation hereinbefore described, defendant corporation negligently caused and/or permitted the metal bolt holding one side of the ash pan to the chain hoist to break."

14. Counsel for plaintiff conducted himself improperly in arguing to the jury and the court did not admonish counsel or instruct the jury to disregard such statements.

15. The court erred in its charge to the jury to the prejudice of the defendant in each of the following respects:

[fol. 286] (1) In charging the jury as follows:

"Plaintiff in this case alleges that he has suffered a permanent disability and that he would be from fifty to sixty per cent disabled. Now, what does that mean? Well, he is a railroad man. He cannot carry on his work on the railroad in the way that he has been. That is the testimony of the doctors here—I think that is not agreed. There is a contradiction on that, is there not?

Mr. Dombey: No, your Honor.

Mr. Alexander: Yes, there is.

Mr. Dombey: Doctor Pickett gave no opinion as to his disability.

The Court: I think that is true.

Mr. Alexander: But there is a conflict in the plaintiff's own testimony.

The Court: Between fifty and sixty per cent.

Mr. Alexander: No.

The Court: Well, you will remember, ladies and gentleman, whether or not there is a conflict here. I do not at this point remember that. It is up to the jury to remember, anyway."

(2) In charging the jury that plaintiff would suffer some humiliation.

(3) In charging the jury as follows:

"and that he has incurred and will be required to incur expense in the future for medicine, medical attention and other necessary treatment."

(4) For remarking in the presence of the jury as follows:

"I do not believe, gentlemen, that there is any reason to submit to the jury the question of comparative negligence. Does either side think that?

Mr. Alexander: We would like to be heard on that.

The Court: Do you want it, or don't you?

Mr. Alexander: Yes.

The Court: Have you prepared a request on that?
Mr. Alexander: We haven't.

The Court: I would like to find out if there is any possible evidence of comparative negligence in this case. Approach the bench, please."

[fol. 287] (5) In charging the jury as follows:

"In other words, your verdict shall be for an amount representing the total amount of damages reduced by an amount in proportion to the amount of negligence, if any, attributable to plaintiff."

(6) In charging the jury as follows:

"Likewise, the plaintiff is required to exercise that degree of care for his own safety that is required by the defendant, that is, ordinary care. You can't go ahead blindly and suffer an accident and then claim to recover for it."

(7) In charging the jury that the instant case of negligence was different from the ordinary case of negligence.

(8) In charging the jury that in this case a doctrine of law enters that is known as res ipsa loquitur.

(9) In charging the jury as follows:

"The Court: What does that mean? Does that mean that the plaintiff is entirely absolved from showing negligence? No, but it recognizes, and these states that have this doctrine recognize this: That sometimes you can't prove negligence because all of the evidence and the proof of the negligence is in somebody else's possession. You can't prove it. It is there but you can't prove it. Or, it may not be there. I don't say it is necessarily there. Don't understand me as saying that. And so, they have this rule that says, 'The thing speaks for itself.'

You go down the street and you see a locomotive —I will get away from a locomotive—you see an automobile on somebody's front porch. Now, in Michigan you would have to show the negligence there, you see. But under this rule you don't have

to show the negligence, if it answers these three requirements: That the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; third, it must not have been due to any voluntary action or contribution on the [fol. 288] part of the plaintiff. Now, that does not mean any contribution at any one time, but as the accident happened.

The Supreme Court of the United States has defined res ipsa loquitur. It means 'that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference;'. So you can, from the facts in this case, infer that there was negligence that caused it somewhere. You see, you can infer that. You can infer that the negligence was entirely on the part of the defendant. You can infer from what happened that there was no negligence on the part of the defendant, or you can infer that there was no negligence on the part of the plaintiff.

When you get in there you begin saying, 'Well, here is what happened.' Nobody saw the bolt break, as I understand, and there is no evidence here whether or not it was a defective bolt necessarily, and there is no evidence one way or the other whether the man who was up above did something he shouldn't have done, by exerting a certain pressure at a certain time. But, you have the right to infer that, or, you have the right to say, 'This is entirely due to the negligence of the plaintiff in this case.'

I go on with the definition of res ipsa loquitur: ' • • • that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that the facts call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict.' I don't know how I can explain it to you any better than in the language of the Supreme Court."

(10) In charging the jury as follows:

"Two men were working on this job, and there is no question but what the man up above was under the supervision of the plaintiff here, but I instruct you now that that does not make any difference because the assumption of risk is not a part of this case. He does not assume the risk of a fellow employee."

[fol. 289] (11) In charging the jury as follows:

"Now, he says he isn't under it, and the defendant has a regulation that says you can't be under anything that is being hoisted up in the air and moving. But I say to this jury that not only is there no evidence that he wasn't under it, but it is up to you to determine if he could have done his work in any other way down there in this three-foot pit. He had to be somewhere close to it because he had to guide it. And that is the only testimony here, there is no question about that, it is not denied at all."

(12) In charging the jury as follows:

"The defendant claims that he should have put some blocks underneath it, but there is not one bit of evidence by anybody that that is the way anybody ever did it. The evidence is that this is the way they did it. The man was not under it and so far as this rule is concerned, ladies and gentlemen, I don't think you have to pay a great deal of attention to it under the facts in this case. There is a question in my mind whether it was ever intended to do that, but it certainly is not intended that a rule will prevent a man from working. He was underneath, while he was underneath guiding this, because there are some flanges or edges by which—if this lamp were inverted and you were putting it up, there is a place for bolts around the side; I think he said about ten on each side, about twenty around that entire ash pan—by which these would fasten the ash pan to the fire box. And while he is steering it and getting it ready, a bolt breaks. It comes

down. It does not fall on him; it falls against him; and he is pressed up against the wall."

(13) In charging the jury as follows:

"Now, it is up to you to determine whether or not they are guilty of negligence, and under the doctrine of res ipsa loquitur, they don't have to prove to you where the negligence lies, I mean the exact nature of the negligence. You can, from the thing itself, determine if there was negligence and what the negligence was; that is, unless it has been rebutted [fol. 290] by some testimony here of the defendant."

(14) In charging the jury as follows:

"All right. When you have found that there was negligence, if you have—now, don't understand me to say because I say 'when you have found'. I should not have said that. If and when you have found that there was negligence, then it is up to you to see whether or not there was contributory negligence, and then apply the rule of comparative negligence as I have outlined to you. And, I don't think it is necessary to go into it again."

(15) In charging the jury as follows:

"Now, what does the plaintiff claim in this case? He claims that he was hurt. There isn't any doubt but what he was hurt at that time. I mean by that, he had a broke nose and he was scarred up and blood, and all that. There is no question about that. But, if you arrive at a verdict in favor of the plaintiff, he certainly would be entitled to something for the pain and suffering of that very day. But the plaintiff says more than that. They said that this man suffered an injury to the eighth dorsal vertebra of the dorsal region, which is the movable part of the back, the most movable part of the back. All of it is movable. And that as a result of this accident the man is 50% to 60% disabled and will be the rest of his life, and they brought testimony in here to that effect. That is the serious part of the case, so far as damages is concerned.

On the other hand, the defendant brought a doctor here who was the man that attended him, who said that they made the X-rays the very day of the accident, and the X-rays showed that this injury that he complains of today he had at that time. That is what Doctor Pickett said. That is not disputed; it is not disputed that the man has that injury; the extent of it, however, is disputed. I have forgotten the medical term that they used—oh, yes, a compression fracture."

[fol. 291] (16) In commenting on the medical reports of Dr. Arnold D. Piatt and Dr. Gerald A. Erhard as follows:

"Now, Doctor Pickett, who was the company doctor, had some other X-rays taken about three or four months later, wasn't that it, from June to September, and Doctor Pickett got reports from these two doctors. The court permitted that testimony when they brought the hospital record here, and under any circumstances, I think, the court should have permitted it. But, one of those doctors, I have forgotten which one, said that while he thought it was an old injury, he would not rule out some other theories, that it was not an old injury. And the other doctor, as I remember, sat on the fence, I think, even more than the other. Isn't that true? So you have got plenty of evidence here that it is an old injury and not something that happened then, and you have testimony that shows that you can't rule out entirely that it was not an old injury. In other words, this jury can find from the testimony here, depending upon which you believe, with the knowledge that this man admits that in '45 or '46 he did suffer an injury, that he has been off the railroad at different times since, but that he was doing his work at that time and had been on the job for some time. You take it all into consideration."

(17) In charging the jury as follows:

"Now, when the point of damages arrives—and when I talk of damages that does not necessarily

mean that I think he should recover damages, but it is like when you say, if you find the defendant guilty or not guilty, you have got to say one or the other. So I say, if you find the plaintiff is entitled to damages, then you set the damages, not to punish the railroad company at all, or not because it is a railroad company, but to compensate him for what he has suffered and what he will suffer, and the fact that he will continue to be unable to support himself, as in this particular job on the railroad, according to the testimony here. But on that there is a difference of opinion, too. You saw the witnesses. It is up to you to determine those questions."

[fol. 292] (18) In charging the jury as follows:

"Now, there has been no evidence introduced concerning medical or hospital bills incurred by the plaintiff to date, but as I stated, the plaintiff if he is entitled to recover may recover for medical, hospital bills, as the evidence may show that it is reasonably certain he will incur in the future."

(19) In charging the jury as follows:

"Now, the danger of mentioning something like that, the juries may get the idea, 'Well, they said $60,000, and if he can recover that's what he can recover'. I do not say one way or the other. I mention the amount because that is the maximum. In arriving at the amount of damages you will determine what will be required to fully compensate the plaintiff for his loss of wages, if any, in the past. There is no evidence about this compensation except that he got it. There is no evidence of the conditions of it, or anything else. You will determine what will be required to fully compensate him for his impaired efficiency as a wage earner in the future, if such be the case, and for his pain and suffering.—There is no humiliation that I can think of, except where a man is physically unable to do a whole day's work. If that is what is meant by humiliation, yes. —both in the past and what may be reasonably anticipated in the future."

(20) In charging the jury as follows:

"You should consider, also, the present worth of a lump sum settlement as it is now available for future medical expenses or future loss of wages. In other words, if you find by a preponderance of the evidence the plaintiff should recover medical expenses and loss of wages which are reasonably certain in the future by making a lump sum award at this time, the plaintiff will have that money available before he would have earned it, or before medical bills are incurred, and plaintiff can keep that portion of any award at interest. You may, therefore, consider these circumstances in arriving at the amount of your verdict."

[fol. 293] (21) In charging the jury as follows:

"Also, as I have heretofore instructed you, if you find by a preponderance of the evidence the defendant was not guilty of negligence which was a direct and proximate cause of the injuries to plaintiff, and you also find that negligence of the plaintiff contributed to his injuries, your verdict shall be for an amount representing the total amount of damages reduced by an amount in proportion to the amount of negligence if any, attributable to plaintiff."

(22) In charging the jury as follows:

"Ladies and gentlemen, the court's attention has been directed to some statements in the charge that might have been misleading, and although I do not feel that all of them have been misleading, possibly some of them have. As a matter of fact, I don't feel any of them have been misleading, or wrong, but I do feel that they ought to be clarified so that there be no question about it.

Now, you remember, I tried to give you an example, tried to show the difference between this kind of a case where I feel the doctrine of res ipsa loquitur applies and one where it does not, and I gave you a situation of an automobile running up on a front porch. Well, there is no automobile in this

case, ladies and gentlemen, and there is no front porch, so far as I know. I just tried to give you an example. So, you can forget the automobile on the front porch as though I never said it to you at all. You can forget it entirely.

Mr. Dombey: I think it should show where that request came from.

The Court: I don't think that that is necessary under the circumstances."

(23) In charging the jury as follows:

"I also perhaps did mention something to the effect that the plaintiff couldn't blindly go ahead. I did that after I had given you the definition of ordinary care. If the defendant's conduct came up to that standard of care which in law is called ordinary care, it was not negligent and it is not liable to this [fol. 294] plaintiff no matter what damage resulted from such conduct. That is a repeat of what I just said; if they are not negligent he can't recover from them. But, it is in again. If his conduct fell below such standard of care then it was negligent, and if such conduct was the direct and proximate cause of the damages complained of, then the plaintiff may recover. Likewise, the plaintiff is required to exercise that degree of care for his own safety that is required of the defendant; that is, ordinary care. And, forget the 'blindly' part. I was just trying to emphasize something. I realize that sometimes you emphasize and give the wrong impression. The definition of ordinary care is what I want you to follow."

(24) In charging the jury as follows:

"Remember that I have said all the way through that the plaintiff must prove negligence, but in a case of this kind you may infer negligence if you believe that the facts so warrant."

(25) In charging the jury as follows:

"Now, the court said it couldn't see how this man could have performed his work in any other manner.

If you jurors think he could, from the evidence as you know it, that is up to you and you are not to be biased by what I think the facts show at all. You are the judges of the facts, not me. The evidence, of course, in some cases is really, perhaps more complete, but that is what makes, in my opinion, this case a case of res ipsa loquitur. Let the thing speak for itself."

(26) In charging the jury as follows:

"I think I have taken care of everything except the damages. You heard the evidence on damages, and I think that he did work and get paid up to September 7, 1949, and that, I think, the claim of the plaintiff is that up to this time he lost $14,400. Now, whether that is true or not is up to you to determine. I think it showed that he was getting $300 a month; is that right?

[fol. 295] Mr. Dombey: Yes, your Honor.

The Court: And that there have been some increases, but I instruct you, you are not to pay any attention to the increases because I don't know what they are and neither do you. But, $300 a month is the figure that you would take into consideration and the years that have been outlined, and the percentage of disability covering those years. I give you those figures without building up anything at all, but the matter of damages is for you, taking everything into consideration."

16. In failing and refusing to charge the jury on the issue of sole negligence of the plaintiff.

17. The court erred and abused its discretion in commenting on the evidence and thereby committed error prejudicial to the rights of the defendant.

18. The court erred in overruling defendant's motion to withdraw a juror and continue the case because of the improper remarks of counsel for plaintiff in requesting the court to inform the jury that counsel for defendant had requested the court's charge to be corrected.

19. The verdict and judgment thereon are against the weight of the evidence.

20. The verdict and judgment thereon are contrary to law.

21. The verdict is excessive and was given under the influence of passion and prejudice.

22. The court erred in refusing to grant a new trial.

Alexander, Ebinger & Wenger, Arvin J. Alexander, Attorneys for Defendant-Appellant.

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[fols. 296-298] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 299] Minute Entry of Argument and Submission—October 13, 1953, omitted in printing

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In the United States Court of Appeals, for the Sixth Circuit

Judgment—Filed March 2, 1954

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for a new trial.

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[fol. 300] In United States Court of Appeals

Opinion—Filed March 2, 1954

Before Allen, McAllister and Miller, Circuit Judges.

Miller, Circuit Judge. The appellee, Francis O'Neill, recovered a judgment in the district court against the appellant, Baltimore and Ohio Railroad Company, in the

amount of $22,000 under the provisions of the Federal Employer's Liability Act, Sections 51-60, Title 45, U. S. Code, for damages suffered in an accident on June 22, 1948, while working for the appellant as a boilermaker in its locomotive maintenance and repair shop at Newark, Ohio. The jury returned a verdict for the appellee in the amount of $32,000, but the trial judge ruled that he would sustain appellant's motion for a new trial unless the appellee filed his remittitur of all damages exceeding $22,000, which the appellee did. The motion for a new trial was then overruled.

On the day of the accident, appellee was installing a heavy, steel ash pan under one of appellant's steam locomotives. He was being assisted by another employee by the name of Janes. They brought the ash pan to the side of the locomotive which was sitting over a work pit. Appellee burned two holes through each side of the ash pan large enough for a half-inch bolt to go through, in order to bolt a chain across the pan which could be used for the purpose of lifting the ash pan by means of a hook and a pull jack. Appellee obtained the half-inch bolts, together with washers and nuts, from the toolroom where appellant kept such supplies. The ash pan was placed in the pit through the use of a crane. The pull jack was placed in the fire box of the engine directly above the ash pan and after the hook was connected with the chain appellee went into the pit. The helper remained in the fire box. The pull jack was manually operated by working a handle up and down. While the ash pan was being raised to place it in its position underneath the engine, appellee was standing in the pit steadying it so it wouldn't tilt either way and to help [fol. 301] guide it into position. Before it reached its position one of the bolts broke and the right side of the ash pan fell against the appellee wedging him between the ash pan and the frame work of the locomotive, causing the injuries complained of.

The complaint as amended contains the following allegation: "During the repair operation hereinbefore described, defendant corporation negligently caused and permitted the metal bolt holding one side of the ash pan to the chain hoist to break, and the steel ash pan weighing

approximately 150 to 200 pounds to drop down and swing to the rear and strike plaintiff in the face and on the body, thereby injuring the plaintiff." The appellee was the only witness who testified for him about the accident. His helper Janes did not testify. Appellee in his testimony described the situation somewhat more in detail than hereinabove stated, including various measurements of the pit, the pan, and distances, but with respect to the immediate cause of the accident gave only brief testimony as follows:

> "Q. Now, did you get it in that position? A. No, sir.
>
> Q. What happened? A. The bolt broke and down came the pan.
>
> Q. What happened to you? A. I was wedged between the ash pan and the frame of the locomotive."

He also stated that at the time he could not see his helper Janes in the fire box. On cross-examination, he testified as follows:

> "Q. Now going back to June 22, 1948, the day of this occurrence, you had a helper working with you by the name of Janes, didn't you? A. Yes, sir.
>
> Q. Your job was to attach an ash pan to a locomotive, isn't that right? A. Yes, sir.
>
> [fol. 302] Q. And, you were in charge of that work, were you not? A. Yes, sir.
>
> Q. You cut the two holes in the ash pan with a torch, didn't you? A. Yes, sir.
>
> Q. You went to the store-room and selected two new one-half inch bolts, a half-inch in diameter for this work, did you not? A. Yes, sir.
>
> Q. When you went into the tool-room you could have selected any size bolt for this job, could you not? A. Yes, sir.
>
> Q. Now, after you got the bolts you went back to your work and you bolted the chain to the pan, didn't you? A. Yes, sir.
>
> Q. And you put the chain in the middle of the pan so that pan would balance when it was being hoisted, didn't you? A. I didn't make no measurements on it,

whether I had it directly in the middle or center. I roughly got it to the center as closely as I could, without measurement."

* * *

"Q. Now after this pan was pulled up into position, Mr. O'Neill, and you had hold of it with your hands, you were trying to juggle it around to make the holes fit, isn't that right? A. Yes, sir."

On re-direct examination, appellee stated that he used the same kind and size of bolts that he had used on similar jobs in the past, and testified as follows to questions asked by the Court:

"The Court: How do you know the bolt broke? The Witness: Mr. Connelley, the master mechanic had me up in his office and showed it to me.

The Court: Did you do this job in the usual way that you have done this job for years?

The Witness: Yes, sir.

The Court: And that others do it?

The Witness: Yes, sir."

[fol. 303] At the close of the appellee's case, the appellant moved for a directed verdict. It contended then, as it does now, that the appellee failed to adduce any proof of appellant's negligence proximately causing appellee's injuries. The District Judge overruled the motion, and after also overruling a similar motion at the close of all the evidence, submitted the case to the jury under the theory of res ipsa loquitur.

Appellee's cause of action is based upon the allegation in the amended complaint that the appellant negligently caused and permitted the metal bolt holding one side of the ash pan to the chain hoist to break. There was no direct evidence of negligence on the part of the appellant. Appellee's testimony was "the bolt broke and down came the pan." There was no evidence as to what caused the bolt to break. There was no evidence that the bolt was defective, although we think the evidence reasonably supports the inference that the bolt broke because it was defective. Under such circumstances, the rule of res ipsa loquitur applies,

namely that when the thing which produced the injury sued for is shown to have been under defendant's exclusive control and management and the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened, an inference of negligence arises which, if not satisfactorily explained, is sufficient to take the case to the jury on the question of negligence. *Southern Ry. Co.* v. *Bennett*, 233 U. S. 80, 86; *Jesionowski, Adm'x.* v. *Boston & Maine R. Co.*, 329 U. S. 452. But, as stated in *Sweeney* v. *Erving*, 228 U. S. 233, where the rule is well analyzed, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference, that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient, and [fol. 304] that other evidence may explain or completely rebut the inference.

Under the rule the burden of proof does not shift from the plaintiff to the defendant, and if the plaintiff offers no evidence pertaining to the issue of negligence other than the facts of the occurrence of the injury, and the explanatory facts are sufficient to rebut the inference, the plaintiff fails to meet the burden and fails to make a case. *Sweeney* v. *Erving*, supra, p. 241. Where the explanatory evidence is contradictory or of such a character as to justify different inferences as to defendant's exercise of due care, it is for the jury to determine whether the inference of negligence has been rebutted by the explanatory evidence. But where the possible inference of negligence is clearly overcome by undisputed evidence free from any reasonable adverse inference, or where the uncontradicted explanatory facts establish non-liability as a matter of law, it is the duty of the court to direct a verdict for the defendant. The application of the rule does not change the general rule that where the evidence as a whole is insufficient to support a verdict for the plaintiff, defendant's motion for a directed verdict should be sustained.

In the present case, the facts on this issue are undisputed.

Appellee's own testimony developed the fact that the bolt was a new bolt selected by him from regular stock, thus eliminating any possible question of the credibility of an adverse witness. The case is thus materially different from the cases, some of which are relied upon by appellee, where equipment in use has become defective through excessive use or lack of proper inspection and repair. The bolt was not manufactured by the appellant; it was purchased by appellant in the usual course of business without notice of any defect. The broken bolt was not called for by appellee and was not introduced in evidence. There was no evidence of any kind in what way it was defective, or that it was not a hidden defect, or that the appellant knew or should have [fol. 305] known that it was defective. As a matter of law, such a purchaser from a manufacturer is not chargeable with negligence if, after passing it on to others in the usual course of business, it proves defective. *Clement* v. *Rommeck*, 149 Mich. 595; *Peaslee-Gaulbert Co.* v. *McMath's Admr.*, 148 Ky. 265, 274-276; *Noble* v. *Sears-Roebuck & Co.*, 12 Fed. Supp. 181, W. D. Wash. See *Schindley* v. *Allen-Sherman-Hoff Co.*, 157 Fed. (2d) 102, C. A. 6th. As pointed out in the following cases, any initial inference of negligence is entirely rebutted by such explanatory evidence with the result that the plaintiff as a matter of law failed to make out a case to go to the jury. *Shankweiler* v. *B. & O. R. Co.*, 148 Fed. 195, C. A. 6th; *Dierks Lumber & Coal Co.* v. *Brown*, 19 Fed. (2d) 732, C. A. 8th; *Gray* v. *B. & O. R. Co.*, 24 Fed. (2d) 671, 673-674, C. A. 7th; *Asprodites* v. *Standard Fruit & Steamship Co.*, 108 Fed. (2d 728, C. A. 5th; *Black Mountain Corp.* v. *Partin's Admr.*, 243 Ky. 791, 796-800; *Dunning* v. *Ky. Utilities Co.*, 270 Ky. 44; *Roanoke R. & Electric Co.* v. *Sterrett*, 108 Va. 533, 62 S. E. 385; *Christensen* v. *Oregon Short Line R. Co.*, (Utah) 99 Pac. 676.

As pointed out by this court in *Southern Ry. Co.* v. *Derr*, 240 Fed. 73, C. A. 6th, the appellee may be able on the second trial of this case to introduce additional proof which would authorize the submission of the case to the jury, but on the extremely limited evidence now before us, the District Judge, in accordance with the ruling in that case and the ruling in *Shankweiler* v. *B. & O. R. Co.*, supra, (C. A. 6th), should have sustained appellant's motion for a directed ver-

dict. See also *Moore* v. *C. & O. R. Co.*, 340 U. S. 573; *Pennsylvania R. Co.* v. *Brubaker*, 31 Fed. (2d) 939, C. A. 6th; *Grand* v. *St. Louis-San Francisco Ry. Co.*, 97 Okla. 111, 221 Pac. 80; *Asprodites* v. *Standard Fruit & Steamship Co.*, supra, 108 Fed. (2d) 728, C. A. 5th; *Lynch* v. *New York, N. H. and H. R. R.*, 294 Mass. 152, 200 N. E. 877; *O'Mara* v. *Pennsylvania R. Co.*, 95 Fed. (2d) 762, C. A. 6th.

[fol. 306] For the purposes of the retrial, we will refer to some other questions that are presented by the appeal and which will be involved in the retrial.

We agree with the ruling of the District Judge that appellee was not guilty of contributory negligence as a matter of law in performing his duties in an apparent violation of Safety Rule No. 86 of the appellant, which prohibited an employee from standing under a load being hoisted or moved by a mechanical device. We do not construe the rule as applying to an employee whose duties required him to be under such a load in order to properly perform the hoisting job. The evidence showed this to be the case.

Dr. Pickett, a medical witness for the appellant, received from Dr. Erhard and Dr. Piatt, who made X-ray films of the injury at Dr. Pickett's request, their separate written reports, which contained their conclusions about what the films showed. On cross examination of Dr. Pickett the trial judge, over appellant's objections, permitted these reports to be read to the jury. We are of the opinion that these reports were not admissible in evidence as substantive testimony concerning the injury. They were not sworn to and the conclusions expressed by the two doctors were not subject to cross-examination. Although there is some conflict in the authorities, we are also of the opinion that they were not admissable as entries of acts or occurrences made in the regular course of business under § 1732, Title 28, U. S. Code, *New York Life Ins. Co.* v. *Taylor*, 147 Fed. (2d) 297, 158 Fed. (2d) 328, C. A. D. C.; *Masterson* v. *Pennsylvania R. Co.*, 182 Fed. (2d) 793, C. A. 3rd; *England* v. *United States*, 174 Fed. (2d) 466, C.A. 5th; *Gencarella* v. *Fyfe*, 171 Fed. (2d) 419, C.A. 1st. See *Palmer* v. *Hoffman*, 318 U.S. 109; *Chapman* v. *United States*, 194 Fed. (2d) 974, 978; C.A. 5th; *Clainos* v. *United States*, 163 Fed. (2d) 593, C.A.D.C. Contra: *Korte* v. *New York, N.H. and H.R. Co.*,

191 Fed. (2d) 86, C.A. 2nd, cert. denied, 342 U.S. 868; *Landon* v. *United States*, 197 Fed. (2d) 128, C.A. 2nd. Appellee [fol. 307] contends that irrespective of the statutory provision the report was admissible on cross-examination of Dr. Pickett to show the data on which Dr. Pickett's opinion was based, and that Dr. Pickett's opinion was not in accord with such data. Where a foundation is properly laid such evidence is admissible on cross-examination for the purpose of discrediting the witness, but the use of such evidence should be strictly limited and the jury carefully instructed about its limited use. The trial judge properly limited the use of this evidence at the time when it was offered and received, but we agree with appellant's contention that the effect of the admonition was nullified by the discussion of this evidence by the Court in its later charge to the jury. Such a conflict can of course be avoided at the next trial.

We see no merit in appellant's contentions that certain allegations should have been stricken from the amended complaint, because they were not supported by the evidence and that the appellee should not have been permitted to amend his complaint to conform to the proof. Rule 15, Rules of Civil Procedure.

It is unnecessary to rule on the propriety of certain portions of the argument to the jury by counsel for appellee, and on the contention that the verdict was excessive by reason of passion and prejudice. Such matters are individual to a particular trial, and may or may not be present in the next trial. Appellant's objection to the right of the trial judge to order a remittitur instead of a new trial falls into the same category. *Minneapolis, St. Paul & S. Ste. Marie Ry. Co.* v. *Moquin*, 283 U.S. 520; *Southern Pacific Co.* v. *Guthrie*, 180 Fed. (2d) 295, 304, C.A. 9th; *United States* v. *Certain Parcels of Lands, Etc.*, 149 Fed. (2d) 81, 83, C.A. 5th.

Appellant makes numerous objections to the Court's charge to the jury. Most of them, at least, are, considering the charge as a whole, without substantial merit. In other instances, where it is claimed that the required degree of conciseness and clarity is lacking, a consideration of the

[fol. 308] objections by the trial judge will enable him at the next trial to eliminate such criticism without difficulty.

The judgment is reversed and the case remanded to the District Court for a new trial.

McAllister, Circuit Judge, dissenting in part. I am of the view that the trial court properly submitted this case to the jury under the doctrine of *res ipsa loquitur*. When the thing which produces the injury is shown to have been under the defendant's control and management, and the occurrence is such as does not happen in the ordinary course of events if due care is exercised, the fact of the happening of the injury itself affords sufficient evidence to support recovery, in the absence of an explanation by defendant tending to show that the injury was not due to defendant's want of care. Exclusive control is not a *sine qua non* for the application of the doctrine; legal control, responsibility for the proper and efficient functioning of the device which caused the injury, and a superior, if not exclusive, position for knowing or obtaining knowledge of the facts which caused the injury are sufficient. *Pitcairn* v. *Perry*, 122 Fed. (2d) 881 (C.C.A. 8).

In this case, the accident was caused by a bolt which broke while holding the heavy ash pan, and resulted in its falling upon the railroad employee. The facts of the accident warrant the inference of negligence. The foregoing inference might be explained away by evidence on the part of defendant that it was not guilty of negligence.

Here the injured employee, before working on the ash pan, had secured a new bolt from the railroad's toolroom. The fact that this was a new bolt which had never been in use does not, in my opinion, exonerate the railroad from negligence, or, in the language of the rule, explain away the inference of negligence. There was a duty on the part of the railroad, in purchasing such bolts, to inspect them in order to ascertain that they were not defective, for they [fol. 309] were used in work where defective bolts might imperil the lives and safety of the employees of the railroad. Such a duty was, of course, implicitly admitted by the railroad, inasmuch as it introduced evidence of its practice in purchasing bolts; and this practice was to inspect the bolts at the plant of the company from which they were purchased, or at the time they were delivered to the rail-

road company. One of the railroad company's witnesses testified that a certain bolt had been sent for test purposes to the engineer of physical tests of the railroad company three and a half months after the accident, by the claims department of the railroad. Moreover, while a chemical test was made of the bolt in evidence—and it appeared that the chemical analysis was of the utmost importance in determining whether a bolt had sufficient tensile strength —there was no testimony by anyone making such a test; and there was no evidence that the bolt which was sent to the engineering department for physical and chemical tests was ever inspected before it broke, or even that it was the same bolt which caused the accident.

The railroad is not a guarantor of the instrumentalities and attachments of its equipment. If inspections, suitably and properly made, would not reveal a defect, and it if did not exist at the time that an accident occurred, the railroad must be held to have used due care. "But the mere fact that it had suitable inspectors, and that its inspectors inspected, does not carry with it, of necessity, the conclusion that [it] was properly inspected;" and it is for the jury to say whether or not, upon all the testimony, the presumption that the bolt was defective at the time of the accident had been removed by testimony showing the kind and extent and time of inspection. See *Erie Railroad Co.* v. *Schomer*, 171 F. 798 (C. C. A. 6). "In short, it is not enough that the evidence of the defendant would, if true, be sufficient to rebut the presumption, because it is for the jury to pass upon the credibility of the witnesses and the truth of the [fol. 310] testimony." *Southern Railway Co.* v. *Hussey*, 42 Fed. (2d) 70 (C. C. A. 8).

The rule of *res ipsa loquitur* creates an inference of fact. It casts on the opposite party the duty of going forward with evidence or risking that the jury will infer negligence from the occurrence. It will take the case to the jury unless the entire evidence is such that the presumption cannot stand against it. It is not enough that the evidence of the defendant would, if true, be sufficient to rebut the presumption, because it is for the jury to pass upon the credibility of the witnesses and the truth of the testimony. To justify a directed verdict, the evidence must be so conclusive that the minds of reasonable men could not differ as to the con-

clusions to be drawn therefrom. *Atchison, Topeka & Santa Fe Ry. Co.* v. *Simmons*, 153 Fed. (2d) 206 (C. C. A. 10)

There was no proof that the bolt which broke was ever inspected before the accident. There was no proof that the bolt which was subjected to physical and chemical tests was the broken bolt that caused the accident. The happening of the accident, under the circumstances disclosed in this case called for application of the doctrine of *res ipsa loquitur* and justified the drawing of an inference of negligence on the part of the railroad company. It cast upon the railroad the duty of going forward with the evidence, or risking that the jury would infer negligence from the occurrence. It required a submission to the jury, since the mere fact that the bolt was new and unused was not such evidence that the inference of negligence could not stand against it. Even though witnesses might have testified as to inspecting the bolt before the accident, it would still be for the jury to pass upon their credibility and the truth of the testimony.

For the foregoing reasons, I am of the opinion that the question of appellant's negligence should be submitted to the jury. On the other aspects of the case, I concur with the opinion of Judge Miller.

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[fols. 311-312] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 313] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 105

[Title omitted]

ORDER ALLOWING CERTIORARI.—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that ...e duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
FILED
JUN 1 1954
HAROLD B. WILLEY, Clerk

No. 799 105

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953.

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FRANCIS G. A. O'NEILL,
Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Respondent.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.**

---

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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### OPINION BY COURT BELOW.

Petitioner, Francis G. A. O'Neill, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment and decision of that court in case number 11,770, entitled Baltimore and Ohio Railroad Company v. Francis G. A. O'Neill,

opinion dated March 2, 1954 (R., 300-310), reported in ... Fed. (2d), ....

The judgment of the Court of Appeals reversed the judgment of the Federal District Court for the Southern District of Ohio and remanded the cause for a new trial. The judgment of the District Court overruling respondent's motion for new trial and in favor of petitioner was entered without opinion. (R., 282.)

## JURISDICTION OF THIS COURT.

The judgment of the United States Court of Appeals for the Sixth Circuit of which review is sought was dated and filed March 2, 1954. (R., 299.)

Jurisdiction to review that judgment by writ of certiorari is conferred on this court by the provisions of the Act of June 25, 1948, c. 646, 62 Stat., 928; U. S. C., Title 28, Section 1254(1), which provides:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

## QUESTIONS PRESENTED FOR REVIEW.

1. In an action under the Federal Employers' Liability Act where the uncontroverted evidence shows that a heavy ash pan was hoisted by a manual jack operated by another employee of respondent and that the ash pan fell and struck petitioner, a boilermaker, because a bolt supplied from respondent's stock bin suddenly and without explanation broke, was the District Court correct in submitting the case to the jury on a permissible inference of defendant's negligence under **res ipsa loquitur?**

2. Did the Court of Appeals for the Sixth Circuit correctly hold that although the evidence reasonably supported an inference of negligence on the part of respondent, such inference was **rebutted as a matter of law** by evidence that petitioner selected two new bolts from respondent's stock bin and that respondent customarily purchased such bolts from another company?

3. May X-ray reports, made by specialists to respondent's doctor and at his request and incorporated into the records of a hospital, be admitted into evidence on cross examination of that doctor under the provisions of Section 1732, Title 28, U. S. C.?

4. When such X-ray reports are admitted into evidence on cross examination of respondent's doctor to show the basis for the doctor's previously stated opinion on direct examination and are limited by the court to that purpose, was error prejudicial to the respondent committed when the court later commented on those reports to the jury?

## STATUTES INVOLVED.

The questions presented for review in this case involve two statutes passed by Congress.

The pertinent statute in the Federal Employers' Liability Act involved in this appeal is Title 45, U. S. C., Section 51, which provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states or Territories or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and

children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, Section 1, 35 Stat., 65; August 11, 1939, c. 685, Sect. 1, 53 Stat., 1404.

Question number three involves the following statute, Title 28, U. S. C., Section 1732, and the portion pertinent to this review provides:

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of such business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing of record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind. * * *" June 25, 1948, C. 646, 62 Statute, 945, as amended August 28, 1951, C. 351, Sections 1, 3, 65 Statute, 206.

## STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against the respondent railroad, defendant below, in the Federal District Court for the Southern District of Ohio. The basis for that court's jurisdiction was that petitioner and respondent were engaged in interstate commerce and the furtherance thereof at the time of petitioner's injuries. The provisions of the Federal Employers' Liability Act (Title 45, U. S. C., Sections 51 and following) were, therefore, invoked.

At the trial the evidence pertinent to questions presented in this petition was uncontroverted. On the day of the accident petitioner, employed as a boilermaker, was assigned to install a heavy ash pan into a locomotive of respondent. (R., 24.) Petitioner accordingly went to respondent's supply room and picked out among other things two half-inch bolts of the usual type and size for performing the job in question. (R., 26, 66.) After burning holes in the sides of the ash pan, petitioner and his helper, Jaynes, fastened a chain onto each side of the ash pan and across the interior and secured the ends of the chain to the sides with bolts, nuts and washers. (R., 27, 28.) The ash pan was then placed into position in the pit underneath the locomotive. (R., 28, 29.) A hook connected to a pull jack was then hooked onto the chain extending from side to side of the ash pan. The helper, Jaynes, in the firebox above manually operated the jack hoisting the ash pan, while petitioner in the pit below steadied and guided the ash pan until it was hoisted to the position where it was to be inserted into the engine. (R., 31-33.)

While the ash pan was suspended, one of the bolts broke and the right side of the ash pan fell, striking petitioner and wedging him between the pan and the frame of the locomotive. (R., 33-34.) The broken bolt was later shown to petitioner by respondent's master mechanic in the latter's office. (R., 66.) At the time the pan was raised, the petitioner could not see his helper, Jaynes, who was manually operating the jack in the firebox. (R., 48.)

Respondent did not produce the broken bolt at the trial, but respondent's witness, Kessler, testified that a bolt of like size and type as the one which had broken had a tensile strength of 66,000 pounds per square inch. (R., 121.)

On cross examination petitioner testified that he had selected two new half-inch bolts for the job. (R., 54.) Respondent's witness, Kessler, testified that the practice of respondent is to purchase bolts and nuts from another company. (R., 116.) Respondent offered **no** evidence to explain why the bolt broke.

It was undisputed that at the time of the trial petitioner was suffering from a compression fracture of one of his vertebrae. The factual issue was whether the accident in question caused the fracture. Respondent's witness, Dr. Ralph Pickett, testified on direct examination as follows (R., 129):

> "Q. You say that you took X-rays? A. I had them taken at the hospital.
>
> Q. Now, what, if anything, did you find as a result of those X-rays? A. Both of my own personal study of the X-rays and **from the report of the X-ray specialists**, we found that there were no broken ribs, but there was an old compression of the eighth dorsal vertebra.
>
> The Court: There was a what?
>
> The Witness: An old compression of the eighth dorsal vertebra." (Emphasis supplied.)

On cross examination X-ray reports, made by Dr. Erhard and Dr. Piatt to Dr. Pickett at the latter's request and incorporated as part of the Newark City Hospital records, were admitted into evidence. (Pl. Ex. 4; R., 264, 157) (Pl. Ex. 5; R., 265, 160.) These reports according to Dr. Pickett's own foregoing testimony constituted at least in part the basis for Dr. Picket's opinion which he expressed on direct examination. The court, at the time these exhibits were admitted, limited the admission for the purpose of showing the information that Dr. Pickett had from these specialists. (R., 158.) A reference to those reports indicate that they are somewhat contradictory to Dr. Pickett's previously expressed opinion that the compression fracture was "old".

The court submitted the cause to the jury under the doctrine of **res ipsa loquitur**. (R., 234, 235.) The jury returned a verdict for petitioner for $32,000.00. (R., 266.) The District Court overruled the respondent's motion for a directed verdict and granted the motion for a new trial unless petitioner agreed to a remittitur to $22,000.00. (R., 281.) Petitioner did agree to such a remittitur (R., 282) and judgment thereon was entered on September 8, 1952. (R., 282.)

On appeal the United States Court of Appeals for the Sixth Circuit held that a permissible inference of a defective bolt due to respondent's negligence was reasonably supported by the evidence. (R., 303.) The court further held, however, that such inference was rebutted by the facts that the bolt was a new bolt selected by petitioner and that it was not manufactured by respondent but purchased by respondent from another company. (R., 304, 305.) The Court of Appeals also held that the reports on the X-rays (Plaintiff's Exhibits 4 and 5) were not admissible as en-

tries in the regular course of business under Section 1732, Title 28, U. S. C. (R., 306.) The court further held that prejudicial error was committed by the District Court in commenting on these reports in its charge to the jury, even though the court had properly limited the use of the reports at the time that they were admitted into evidence. (R., 307.) The judgment of the Court of Appeals reversed the judgment of the District Court and remanded the cause for a new trial. (R., 299.)

## ARGUMENT.

**Summary.**

This is an action arising under the Federal Employers' Liability Act (Title 45, U. S. C., Sections 51 and following), but the issues transcend that Act.

Two members of the Court of Appeals for the Sixth Circuit have upset a verdict and judgment for petitioner. The District Court and all three members of the Court of Appeals agreed that an inference of negilgence was raised by the evidence in this case under **res ipsa loquitur**. A majority of the Court of Appeals held that such inference has been rebutted as a matter of law. This holding was erroneous for the first reason that respondent offered **no** evidence in explanation of why the bolt broke. Secondly, the court resorted to cases involving liability of manufacturer and retailer to a purchaser which have no bearing on this case. Certainly, respondent's statutory and common law duty to its employee did not cease because the bolt was new or because it was purchased from another company. The final and most serious error in the court's reasoning on **res ipsa loquitur** was that the **court** was substituted for the **jury** to determine whether an inference of **fact** had been rebutted. This rationale directly conflicts with the principles announced by this court and federal circuit courts in decisions on **res ipsa loquitur** and in numerous cases arising under the Federal Employers' Liability Act. That holding was a usurpation by the court of the jury's province. The practical effect of that holding, if permitted to stand, will seriously erode, if not completely wipe out, the principle of **res ipsa loquitur** in the Sixth Circuit. This error on **res ipsa loquitur** reaches beyond actions by railroaders.

It involves a misconception of the respective functions of judge and jury. This error alone furnishes ample reason to grant certiorari and to review and reverse the decision of the Court of Appeals for the Sixth Circuit.

An important error in the admissibility of evidence was also committed by the Court of Appeals. X-ray reports duly incorporated into the records of a hospital concerning the patient have been held inadmissible in the face of the plain meaning of the pertinent statute. Title 28, U. S. C., Section 1732. The error is particularly apparent in this case, since those reports were made to the very doctor in whose cross examination they were admitted. The reports were, therefore, completely reliable, and there was no doubt but that they had been entered into the hospital records in the regular course of the business of the hospital. It is apparent that the decision in **Palmer v. Hoffman**, 318 U. S., 109, was misinterpreted. It is also clear that the decision of the Sixth Circuit Court of Appeals was in conflict with decisions in other federal circuits. (R., 306.)

Finally, the court's comment to the jury on the reports was not prejudicial to respondent. Those reports were admissible at any event on cross examination of respondent's doctor. Their use was limited at the time. The jury had the right to see and read those reports, and the comment by the court should not upset a verdict which was supported by other evidence on the factual issue of injury to petitioner.

**Questions 1 and 2.**

These questions will be considered together. To avoid a long and cumbersome single question, we have separated the two considerations—the applicability of **res ipsa loquitur** and the claimed rebuttal of the inference. Ac-

tually, the second intertwines with the first, and the error of reasoning by the Court of Appeals for the Sixth Circuit permeates both.

The Court of Appeals for the Sixth Circuit has upset a verdict and judgment for petitioner by turning the judicial clock back to two early decisions in the Sixth Circuit. That Court correctly held in this case that the evidence under the doctrine of **res ipsa loquitur** would support an inference by the jury that the bolt broke due to respondent's negligence (R., 303), with the direct result that petitioner, a railroader, was struck by a heavy ash pan and seriously injured. In this holding all three judges concurred, along with the judge in the District Court. Two of the three judges of the Court of Appeals, however, then completely destroyed the effect of the inference by holding that **as a matter of law** the inference had been rebutted. (R., 304, 305.) The District Court according to the majority of the Court of Appeals should have directed a verdict for respondent. (R., 305.)

This holding is in direct conflict with the definition of and principles governing the application of **res ipsa loquitur** announced by this court in the decisions in **Sweeney v. Erving**, 228 U. S., 233; **Jesionowski v. Boston & Maine Railroad Company**, 329 U. S., 452; and **Johnson v. United States**, 333 U. S., 46. The holding by the Sixth Circuit also conflicts with decisions in other circuits. **Atchison, Topeka & Santa Fe Railway Company v. Simmons**, 153 Fed. (2d), 206 (C. C. A., 10); **Terminal Railroad Association of St. Louis v. Staengel**, 122 Fed. (2d), 271 (C. C. A. 8).

In referring to the decision of this court in **Sweeney v. Erving**, 228 U. S., 233, supra, the Court of Appeals in its opinion (R., 303, 304) omitted the very heart of the doctrine

of **res ipsa loquitur**, namely "that they (the facts) make a case to be decided by the jury." A **complete** quotation of the definition found in **Sweeney v. Erving** is (p. 240 of the opinion):

> "In our opinion, res ipsa loquitur means that **the facts of the occurrence warrant the inference of negligence**, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; **that they make a case to be decided by the jury**, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the **jury** is whether the preponderance is with the plaintiff." (Emphasis supplied.)

The Court of Appeals for the Sixth Circuit confused what constitutes sufficient evidence "to make a case for the jury" with the burden of proof. The decision in **Sweeney v. Erving** was that the permissible inference of negligence under **res ipsa loquitur** does not shift the burden of proof. Of course not! That inference does, however, make a case for the jury. Indeed in **Sweeney v. Erving** the lower court **did** submit the case to the jury and a verdict for defendant resulted. It was plaintiff's contention in that case that the lower court erred in failing to charge that the burden of proof shifted to the defendant. The court held that the burden did not shift. The Court of Appeals, therefore, misinterpreted the **Sweeney v. Erving** rationale and disregarded the most important effect of **res ipsa loquitur.**

The Court of Appeals' decision in this case also conflicts with the principles laid down in the decisions in **Johnson v. United States**, 333 U. S., 46, supra; and **Jesionowski v.**

**Boston & Maine Railroad Company**, 329 U. S., 452, supra. In this case the essence of the uncontroverted evidence is that a bolt supplied by respondent broke without explanation and permitted an ash pan to fall and strike petitioner. (R., 33, 34.) Under the facts and holding in **Johnson v. United States**, supra, and the holding in **Jesionowski v. Boston & Maine Railroad Company**, supra, a permissible inference of defendant's negligence clearly made a case for the jury. As this court stated in the **Jesionowski** opinion at page 457:

> "* * * Thus the question here really is not whether the application of the rule relied on fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding that this derailment was a result of the defendant's negligence."

Contrast the strong explanatory evidence in the **Jesionowski** case with the so-called explanatory evidence in this case. In the former there was strong evidence that the decedent's own negligence caused the derailment. In this case **no** explanation for the breaking of the bolt was offered by respondent. The bolt itself was not produced at the trial by respondent. Yet the Court of Appeals held that because the pertinent bolt was a new bolt (R., 54) and because respondent's "practice" was to purchase bolts from another company (R., 116), the inference was overcome, and the "explanatory facts" established "non-liability as a matter of law." (R., 304, 305.)

To support this judicial usurpation of the jury's province the court cited cases dealing with the liability of a purchaser from a manufacturer to a third party. (R., 305.) To put it most kindly, this was certainly a strained analogy. Those cases dealt with state law and a duty owed by a

retailer to a purchaser. Here we are dealing with a federal statutory and common law duty owed by an employer to his employee. That duty included, among other things, the use of reasonable care to provide the petitioner with a safe place to work and safe equipment and parts. Congress did not carve an exception from that duty to exclude new parts or parts purchased from others. The novel proposition advanced by two of the members of the Court of Appeals seems to be that the railroad's duty ceased because the bolt was new and purchased from another company.

To support the conclusion that the District Court should have directed a verdict for respondent, two members of the Court of Appeals resorted principally to two early decisions in the Sixth Circuit. **Shankweiler v. Baltimore and Ohio Railroad Company,** 148 Fed., 195 (C. C. A. 6); and **Southern Railway Company v. Derr,** 240 Fed., 73 (C. C. A. 6). (R., 305.) Those decisions do not represent the law today. Even so the **Shankweiler** case, involving early Ohio law, is exactly the reverse of this case on the explanatory evidence offered. In that case the railroad **did** produce evidence to show why the pertinent part (a brake rod) broke. The defect was shown, but it was also shown that the defect was concealed. Even further, there was evidence to show that an inspection of that very part had been made a short time prior to the accident. (Opinion, pp. 195, 196.) The contrast between such explanatory evidence and the utter lack of any such evidence in this case is obvious.

Aside from the foregoing, the decisions of this court hold that a permissible inference of negligence under **res ipsa loquitur** means that the **jury** may accept or reject the explanation. To hold that a **court** may accept the explanation and reject an inference of **fact** is a clear invasion by the

court of the province reserved for the jury. The acceptance or rejection of factual inferences has been held time and time again by this court to be the exclusive function of the jury. In the opinion in **Johnson v. United States**, 333 U. S., 46, this court stated:

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events."

The same principle is found in the opinion in the decision in **Jesionowski v. Boston & Maine Railroad Co.**, 329 U. S., 452, supra. See also **Lavender v. Kurn**, 327 U. S., 645.

In an analogous decision involving a carrier's liability to an injured passenger, this court held in the case of **Gleeson v. Virginia Railroad Company**, 140 U. S., 435, at p. 444:

> "The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility or of the Act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. **And it is for the jury to say in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances.**" (Emphasis supplied.)

Federal law, of course, governs in this case. The later Ohio decisions on **res ipsa loquitur** have adopted the principles set forth by this court in **Sweeney v. Erving**, supra. The reasoning expressed by the Ohio Supreme Court in

the case of **Fink v. N. Y. C. R. Co.**, 144 Oh. St., 1, is, therefore, pertinent. In that case plaintiff offered evidence of a derailment. Defendant's explanatory evidence was that a stalled car on the tracks caused the derailment. The court held that whether the explanation overcame the inference was a question of **fact** for the jury. The reasoning of the court is found at p. 10:

> "It would be a strange doctrine to say that in a jury trial the court is not permitted to draw the inference of negligence in a case which calls for the application of the rule and then to say that the court could determine as a matter of law that the inference had been rebutted or destroyed by an explanation offered by the defendant, of the circumstances of the occurrence."

The majority of the Court of Appeals not only rebutted an inference of **fact** by their own finding, but indulged in some inferences of their own in so doing. There is no evidence of why the bolt broke or of notice on the part of the respondent one way or the other. Yet the court **infers** that respondent had no notice of any defect. (R., 304.) This merely illustrates the basic error—the court's invasion into the jury's province of fact-finding.

It is of small comfort to petitioner that the cause has been remanded for a new trial. The proof called for in the opinion of the Court of Appeals (R., 304, 305) is in the possession of and within the exclusive knowledge of respondent. It will be difficult, if not impossible, for petitioner to enlarge on his proof in the event of a new trial. Respondent with its vast array of expert talent has complete control of the specific proof. Indeed, the situation in this case is a striking illustration of the reason and justice in the principles of **res ipsa loquitur**. We do not want our position to be misunderstood. That position is that the decision of the Court of Appeals permitting a court to rebut

an inference of fact by a ruling of so-called law in practical effect removes **res ipsa loquitur** from the Sixth Circuit. An important part of the right to have a jury decide the ultimate facts has been denied petitioner.

This error should by all means be corrected by this court.

**Question 3.**

X-ray reports were made to respondent's doctor and incorporated into the records of Newark City Hospital. (Pl. Ex. 4; R., 264, 157) (Pl. Ex. 5; R., 265, 160.) On the stand that doctor gave an opinion at least in part at variance with the data in those reports. (R., 129.) On cross examination the reports were admitted and limited by the court.

Irrespective of later comment by the court, these reports were admissible as proof of their contents under Section 1732, Title 28, U. S. C.

The decision in **Palmer v. Hoffman**, 318 U. S., 109, has been misinterpreted by the Court of Appeals. In the **Hoffman** decision the basis for excluding an accident report made to a railroad was that such a report was not in furtherance of the business of the railroad as such, but rather in the furtherance of litigation (p. 114 of the opinion). No such objection exists in this case. The X-ray reports were without doubt incorporated into the hospital records relating to treatment of petitioner in the regular course of the business of the hospital, namely, the treatment of patients.

The conclusions expressed in those reports are actually statements of interpretation of the films. The reports, therefore, are quite different from those excluded in the decisions cited in the opinion of the Court of Appeals. (R., 306.)

In any event the decision on this point directly conflicts with the decisions in **Korte v. New York, New Haven and New Hampshire R. Co.**, 191 Fed. (2d), 86 (C. C. A. 2), cert. denied, 342 U. S., 868; **Landon v. United States**, 197 Fed. (2d), 128 (C. C. A. 2); and **Moran v. Pittsburgh-Des Moines Steel Co.**, 183 Fed. (2d), 467 (C. C. A. 3).

**Question 4.**

Under any rule of evidence the only error committed with respect to the X-ray reports came when the court commented to the jury on their contents. These reports were sent into the jury deliberating room. The jurors undoubtedly read them. Those reports spoke for themselves; their contents contradicted Dr. Pickett. All of this would be completely proper since they were properly admitted and limited (under any rule of evidence) on cross examination. It is obvious that the remarks of the court were not prejudicial. Petitioner performed hard work up to the time of the accident. (R., 21.) This and other uncontroverted evidence (for example, his inability to work after the accident), amply supported the jury's obvious finding that the fall of the pan did cause petitioner's undisputed disability.

## CONCLUSION.

The Court of Appeals for the Sixth Circuit by a majority holding has committed serious error in its decision on **res ipsa loquitur**. The practical effect of that holding is to wipe out the doctrine in the Sixth Circuit.

Also serious is the Court of Appeals' misinterpretation of **Palmer v. Hoffman**, supra, as applied to the admissibility of records under Section 1732, Title 28, U. S. C.

In view of these errors this court should grant writ of certiorari to review the decision of the Court of Appeals.

The judgment of the Court of Appeals should be reversed and final judgment for petitioner should be ordered in accordance with the judgment of the District Court.

Respectfully submitted,

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HAROLD B. WILLEY, Clerk

No. 105.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954.

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FRANCIS G. A. O'NEILL,
Petitioner,

vs.

THE BALTIMORE & OHIO RAILWAY COMPANY,
Respondent.

---

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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## BRIEF OF PETITIONER ON MERITS.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954.

No. 105.

FRANCIS G. A. O'NEILL,
Petitioner,

vs.

THE BALTIMORE & OHIO RAILWAY COMPANY,
Respondent.

## BRIEF OF PETITIONER ON MERITS.

## I.

## OPINION IN THE COURT BELOW.

On March 2, 1954, the United States Court of Appeals for the Sixth Circuit reversed the judgment of the United States District Court for the Southern District of Ohio and remanded the case for a new trial (R. 174). The opinion is reported in 211 Fed. 2d 190 (R. 174-184). The order of the United States District Court denying respondent's motion for judgment in accordance with a directed verdict (R. 160) and the order overruling respondent's motion for a new trial (R. 161) were entered without opinion.

## II.

## JURISDICTION OF THIS COURT.

The judgment of the United States Court of Appeals for the Sixth Circuit under review was dated and filed March 2, 1954 (R. 174). Petitioner filed petition for certiorari on June 1, 1954, and this Court granted certiorari on October 14, 1954 (R. 184).

Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit is conferred upon this Court by the provisions of the Act of June 25, 1948, C. 646, 62 Stat., 928; U.S.C. Title 28, Section 1254 (1), which provides:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

## III.

## STATUTES INVOLVED.

Two statutes passed by Congress are involved in this review. Section 51 of the Federal Employers' Liability Act (Title 45, U.S.C., Section 51) provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states or Territories or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the states or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative,

for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier as entitled to the benefits of this chapter." Apr. 22, 1908, C. 149, Section 1, 35 Stat., 65; August 11, 1939, C. 685, Sect. 1, 53 Stat., 1404.

Section 1732 of Title 28, U.S.C., is also involved and the portion pertinent to this review provides:

"(a) In any court of the United States, and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of such business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing of record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind. * * *" June 25, 1948, C. 646, 62 Statute, 945, as amended August 28, 1951, C. 351, Sections 1, 3, 65 Statute, 206.

## IV.

## QUESTIONS PRESENTED FOR REVIEW.

1. In an action under the Federal Employers' Liability Act where the uncontroverted evidence shows that a heavy ash pan was hoisted by a manual jack operated from above by another employee of the respondent railroad and that the ash pan fell and struck petitioner, a boilermaker, because a bolt supplied from respondent's stock bin suddenly and without explanation broke, was the District Court correct in submitting the case to the jury on a permissible inference of defendant's negligence under **res ipsa loquitur**?

2. Did the Court of Appeals for the Sixth Circuit correctly hold that the District Court should have granted respondent's motion for a directed verdict upon the ground that although the evidence reasonably supported an inference of negligence on the part of respondent, such inference was **rebutted as a matter of law** by evidence that petitioner selected two new bolts from respondent's stock bin and that respondent customarily purchased such bolts from another company?

3. May x-ray reports, made by specialists to respondent's doctor and at his request and incorporated into the records of a hospital, be admitted into evidence on cross examination of that doctor under the provisions of Section 1732, Title 28, U.S.C.?

4. When such x-rays reports were admitted into evidence on cross examination of respondent's doctor to show the basis for the doctor's previously stated opinion on direct examination and were limited by the court to that purpose, was error prejudicial to the respondent committed when the court later commented on those reports to the jury?

## V.

## STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against the respondent railroad, defendant below, in the Federal District Court for the Southern District of Ohio. The basis for that court's jurisdiction was that petitioner and respondent were engaged in interstate commerce and the furtherance thereof at the time of petitioner's injuries. The provisions of the Federal Employers' Liability Act (Title 45, U.S.C., Sections 51 and following) were, therefore, invoked.

At the trial the testimony of petitioner concerning the facts of the accident was uncontroverted. On the day of the accident, June 22, 1948, petitioner, employed by respondent as a boilermaker in Newark, Ohio, was assigned to install a heavy ash pan into a locomotive of respondent (R. 7). Petitioner accordingly went to respondent's supply room and picked out among other things two new, half-inch bolts of the usual type and size for performing the job in question (R. 10, 35, 47). After burning holes in the sides of the ash pan, petitioner and his helper, Jaynes, fastened a chain onto each side of the ash pan and across the interior and secured the ends of the chain to the sides with bolts, nuts and washers (R. 10-12). The ash pan was then placed into position in the pit underneath the locomotive (R. 12). A hook connected to a pull jack was then hooked onto the chain extending from side to side of the ash pan. The helper, Jaynes, in the firebox above manually operated the jack hoisting the ash pan, while petitioner in the pit below steadied and guided the ash pan until it was hoisted to the

position where it was to be inserted into the engine (R. 13-16).

While the ash pan was suspended, one of the bolts broke and the right side of the ash pan fell, striking petitioner and wedging him between the pan and the frame of the locomotive (R. 16, 17). At the time the pan was raised, petitioner's helper, Jaynes, was in the firebox above, and petitioner did not communicate with him (R. 29). During that time, moreover, petitioner could not see his helper in the firebox (R. 30).

Petitioner testified that respondent's master mechanic showed him the broken bolt in the latter's office (R. 47). Respondent, however, did not call the master mechanic as a witness and did not produce the bolt at the trial.

Respondent, furthermore, offered **no** evidence to explain why the bolt broke. While there was testimony by respondent's witness, Kessler, of a test made of **some** bolt (R. 79-81), there was no evidence by the person who allegedly made the test, and there was no evidence to show that the bolt which was tested more than three years after the accident was the same bolt that actually was involved. In fact, on cross examination witness, Kessler, stated that the tested bolt "Failed due to bending" (R. 81). Respondent, furthermore, introduced no evidence of inspection of the bolt prior to the accident.

Respondent's witness, Kessler, a resident of Baltimore, Maryland, testified that he knew of the "practice" of respondent in purchasing bolts and nuts (R. 78). He described that practice as follows (R. 78):

> "Q. What is that practice; how are they purchased?
> A. The company receives an order with the instructions that the test department will either inspect the

material at the plant or waive inspection at that time and inspect it at the storehouses of the company."

It was undisputed that at the time of the trial petitioner was suffering from a compression fracture of one of his vertebrae. The factual issue was whether the accident in question caused the fracture. Respondent's witness, Dr. Ralph Pickett, examined and treated petitioner after the latter had been hurt (R. 84). The doctor testified on direct examination as follows (R. 84, 85):

"Q. You say that you took x-rays?

A. I had them taken at the hospital.

Q. Now, what, if anything, did you find as a result of those x-rays?

A. Both of my own personal study of the x-rays and **from the report of the x-rays specialists,** we found that there were no broken ribs, but there was an old compression of the eighth dorsal vertebra.

The Court: There was a what?

The Witness: An old compression of the eighth dorsal vertebra." (Emphasis supplied.)

On cross examination those x-ray reports, made by Dr. Erhard and Dr. Piatt to Dr. Pickett at the latter's request and incorporated as part of the Newark City Hospital records, were admitted into evidence (Pl. Ex. 4; R. 110, 158) (Pl. Ex. 5; R. 113, 159). These reports according to Dr. Pickett's own foregoing testimony constituted at least in part the basis for Dr. Pickett's opinion which he expressed on direct examination. The court, at the time these exhibits were admitted, limited the admission for the purpose of showing the information that Dr. Pickett had from these specialists (R. 111). A reference to those reports indicate that they are contradictory to Dr. Pickett's previously expressed opinion that the compression fracture was "old."

The District Court overruled respondent's motion for a directed verdict made at the close of petitioner's case (R. 77) and renewed at the close of all the evidence (R. 125).

The court submitted the cause to the jury under the doctrine of **res ipsa loquitur** (R. 133-135). The jury returned a verdict for petitioner for $32,000.00 (R. 159). The District Court overruled the respondent's motion for judgment in accordance with a directed verdict and granted its motion for a new trial unless petitioner agreed to a remittitur to $22,000.00 (R. 160). Petitioner did agree to such a remittitur (R. 160) and judgment overruling respondent's motion for new trial was entered on September 8, 1952 (R. 161).

On appeal the United States Court of Appeals for the Sixth Circuit stated in its opinion that a permissible inference of a defective bolt due to respondent's negligence was reasonably supported by the evidence (R. 177, 179). The Court (one judge dissenting) then held, however, that such inference was rebutted as a matter of law by what the majority termed the "uncontradicted explanatory facts" that the bolt was a new bolt selected by petitioner and that the bolt was not manufactured by respondent but purchased by respondent from another company (R. 178, 179). The Court of Appeals also held that the reports of the x-rays (Pl. Ex. 4 and 5) were not admissible as entries in the regular course of business under Section 1732, Title 28, U.S.C. (R. 180). The Court went on to hold that prejudicial error was committed by the District Court in commenting on these reports in its charge to the jury, even though that court had properly limited the use of the reports at the time that they were admitted into evidence (R. 181).

Judge McAllister, dissenting in part, held that the case was properly submitted to the jury under **res ipsa loquitur** (R. 182-184).

The judgment of the Court of Appeals reversed the judgment of the District Court and remanded the cause for a new trial (R. 174). In so holding, the majority of the Court of Appeals did not expressly rule upon certain of respondent's Statement of Points filed on appeal (the points are itemized, R. 161-174), as they concluded that the new trial would remove any objections (R. 181, 182).

Petition for certiorari was filed June 1, 1954, and on October 14, 1954, this Court's order granting writ of certiorari was entered (R. 184).

## VI.

## ARGUMENT.

**Summary.**

Two members of the Court of Appeals for the Sixth Circuit have upset a verdict and judgment for petitioner in the District Court. All four judges who have reviewed this case have agreed that the evidence raised a permissible inference of negligence on the part of the respondent. The majority of the Court of Appeals have held that this inference was rebutted as a matter of law. In so holding, the Court made a serious misstep into the exclusive province of the jury—the finding of facts. The claimed rebuttal was based upon the testimony that the bolt which broke was new and that the practice of respondent was to purchase its bolts from outside sources.

That evidence, even if accepted as conclusively established, does not meet the permissible inference of excessive or improper application of force from above by the operator of the manual hoist. Such inference remains without any explanation. The basic error was here implicit: the Court's own inference led it to conclude that a defect caused the bolt to break.

Nor was the inference of a negligent defect rebutted as a matter of law. In so holding the Court of Appeals again indulged in an inference to conclude that an overall practice of respondent was specific proof that the pertinent bolt had been purchased in accordance with the practice. Even more unwarranted was the inference that the bolt was purchased without notice of defect when there was no evidence of any inspection of the pertinent bolt or of any shipments of bolts received at the place of the accident. The Court

even went so far as to decide the credibility of respondent's witness, Kessler, by making his testimony conclusive.

The Court of Appeals took a long step backward in jurisprudence to those days when courts were astute to overturn factual conclusions by superimposing various theories of so-called law. A new bolt, according to the Court, could not be the subject of an inference of negligence. This is a strange proposition since the Federal Employers' Liability Act in plain language imposes a duty upon respondent to use due care to provide equipment without defects.

It was for the **jury** to accept or reject the so-called explanatory facts in this case, just as it was for the **jury** to accept or reject the permissible inferences of negligence. This is in accord with the leading decisions applying the federal law on res ipsa loquitur, and it is in accord with this Court's repeated admonition that the acceptance or rejection of factual inferences is for the jury. The Court of Appeals misquoted and misapplied the decision of this Court in **Sweeney v. Erving**, 228 U. S. 233, by confusing what makes a case for the jury with the burden of proof.

In short, if the decision of the Court of Appeals is allowed to stand, the rule of res ipsa loquitur laid down by this court has been seriously eroded. The right of petitioner to have factual issues decided by the proper fact-finding body, the jury, has, moreover, been seriously limited.

The Court of Appeals has held that x-ray reports of specialists made to respondent's doctor and incorporated into the hospital records of the treatment of petitioner are not admissible as entries under the Federal Shop Book Rule, Title 28, U.S.C. Section 1732. This holding involved a misinterpretation of this Court's reasoning in **Palmer v. Hoffman**, 318 U. S. 109, and further was contrary to the plain meaning of the statute.

Finally, the court's comment to the jury on the reports was not prejudicial to respondent. Those reports were admissible at any event on cross examination of respondent's doctor. Their use was limited at the time. The jury had the right to see and read those reports, and the comment by the court should not upset a verdict which was supported by other evidence on the factual issue of injury to petitioner.

**Questions 1 and 2**

These two questions may be considered together, since consistent reasoning and principles should be applied to the evidence in this case in resolving both questions.

The uncontroverted testimony of petitioner shows that he took from respondent's stock bin two new bolts of the usual size and type for the job in question. These bolts were used to secure a chain to a heavy ash pan. That pan was raised to a suspended position by a hoist or jack which was manually operated by another employee of respondent who was above the pan and in respondent's locomotive. Petitioner steadied and guided the pan from below. The pan, while suspended, suddenly fell and struck petitioner in the pit below because one of the bolts broke. The supply, condition and strength of the bolt and the action of the employee above were of course imputable solely to respondent. Under those circumstances the jury could properly infer that a negligently defective bolt or excessive and improper application of force from above, or both, caused the bolt to break and the pan to fall. The District Court was correct in so charging the jury (R. 134, 135).

Such application of the doctrine of **res ipsa loquitur** was correct under the leading decisions of this Court. **Johnson v. United States,** 333 U. S. 46; **Jesionowski v. Boston &**

**Maine Railroad Company**, 329 U. S. 452; **Sweeney v. Erving**, 228 U. S. 233. Such application was consistent, also, with principles and decisions in other cases applying the doctrine under federal law. **Sweeting v. Pennsylvania Railroad Company**, 144 Fed. (2d) 611; **Pitcairn v. Perry**, 122 Fed. (2d) 881; **Eker v. Pettibone**, 110 Fed. (2d) 451; **Central Railway Company of New Jersey v. Piluso**, 286 Fed. 661; **Taylor v. Reading Company**, 83 Fed. Supp. 80; **Propper v. Chicago, R. I. & P. R. Co.**, 54 N. W. (2d) 840, Supreme Court of Minnesota.

Indeed all four judges who have ruled on this case up to this point have agreed that the evidence in this case raised a permissible inference of negligence on the part of respondent. All three judges of the Sixth Circuit Court of Appeals concurred with the District Court on this point (R. 177, 178, 182).

The verdict of the jury, consequently, should have ended this case so far as permissible inferences of fact are concerned. Two members of the Court of Appeals, however, in a judicial departure from the principles laid down by this Court, held that the permissible inference of respondent's negligence had been rebutted as a matter of law (R. 178, 179). Their reasoning was based upon what they termed "uncontradicted explanatory facts" (R. 178); namely, that the bolt was "new" and that the bolt was not manufactured by respondent but purchased "in the usual course of business without notice of any defect" (R. 179).

The basic error in this holding is obvious: it is directly contrary to this Court's repeated holding that the province of fact-finding, which necessarily involves inference and speculation, is for the jury. **Lavender v. Kurn**, 327 U. S. 645. The basic misstep by the majority of the Court of Appeals led to a path of errors.

First of all, the so-called explanatory facts do not meet a permissible inference of improper and excessive force by the operator of the jack from above. Respondent did not produce at the trial the bolt which failed. Respondent did not call as a witness either the master mechanic who showed petitioner the broken bolt (R. 47) or the operator of the hoist. No explanation was offered as to why the bolt broke. Respondent's witness, Kessler, testified about the test of some bolt, but it was not shown to be the bolt which caused the pan to fall (R. 78-81). The tested bolt, moreover, failed due to bending (R., 81), yet was found to possess a tensile strength of 66,000 pounds per square inch! (R. 83) If such testimony was worth anything, it would imply that excessive force had been applied to that particular bolt. Implicit in the Court of Appeals' decision, then, was this error: the **Court** apparently inferred or assumed that a defect was the cause of the breaking of the bolt. Even assuming that the inference of defect had been rebutted as a matter of law, the Court of Appeals was wrong. The permissible inference of the operator's negligence remained without an iota of explanatory evidence. Precisely applicable is this Court's statement in the opinion in **Johnson v. United States**, 333 U.S. 46:

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events."

The permissible inference of a defective bolt was not, however, rebutted as a matter of law. The Court of Appeals indulged in still further inferences in arriving at their "uncontroverted" conclusions of fact. From the testimony of respondent's witness from Baltimore that respondent's "practice" was to purchase bolts, the Court apparently as-

sumed or inferred that the pertinent bolt in Newark, Ohio, had been obtained in that manner. Not only that, but the Court made still another inferential leap to the factual conclusion that the bolt was purchased "without notice of any defect" (R. 179). Witness Kessler's testimony about respondent's "practice" was, of course, uncontroverted. Did that make it **conclusive**? The answer is obvious, yet the Court's opinion treated it as such.

How could petitioner's testimony that the bolt was new have anything to do with this case? Under Section 51 of the Federal Employers' Liability Act respondent is liable for a negligent defect in its equipment, new or old, and whether purchased from others or not. Respondent had a duty at all times and all places to use due care to furnish petitioner a safe place to work, including safe equipment. **Bailey v. Central Vermont Ry. Co.**, 319 U.S. 350. The duty to inspect applies, for example, to new as well as to old equipment. There was no proof that the bolt which broke was inspected before the accident; there was not even proof of any inspection of any particular shipment of which this bolt might have been a part.

Contrast the lack of explanatory evidence in this case with that involved in **Jesionowski v. Boston & Maine R. Co.**, 329 U.S. 452, where the decedent's own negligence may well have caused his death.

Compare, furthermore, the absence of explanatory evidence in this case with the requirements for a directed verdict laid down in the case of **Chicago & N. W. R. Co. v. Green**, 164 Fed. (2d) 55, at pages 59 and 60:

> "In connection with what we have said, there must be kept in mind the emphasis in the recent decisions of the Supreme Court that the scope of jury inference in cases under the Federal Employers' Liability Act must be liberally and not narrowly or stultifyingly viewed.

See Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574, 65 S. Ct. 421, 89 L. Ed. 465; Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520; Bailey v. Central Vermont Ry. Co., 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444. CF also Chicago & N. W. R. Co. v. Grauel, 8 Cir., 160 F. 2d 820. And traditionally, even more plenary than in cases requiring proof of specific negligence is the scope of inference which has been recognized as being open to a jury in situations of res ipsa loquitur.

* * * * * * * * *

"Only where defendant's evidence of **explanation** and exculpation is **so legally absolute that no possible hypothesis of proximate negligence can reasonably survive** it on the facts and circumstances of the accident is a court entitled to direct a verdict in a res ipsa loquitur case." (Emphasis supplied.)

The identical rule is stated in the syllabus by the Supreme Court of Minnesota in **Propper v. Chicago, R. I. & P. R. Co.**, 54 N. W. (2d) 840. Also see the decisions in **Atchison, Topeka & Santa Fe Railway Company v. Simmons,** 153 Fed. (2d) 206; **Terminal Railroad Association of St. Louis v. Staengel,** 122 Fed. (2d) 271.

The foregoing decisions lead us again to the basic error of the Court of Appeals: the invasion of the jury's province of fact-finding. This Court has held time after time that the acceptance or rejection of factual inferences is the exclusive function of the jury. The doctrine of **res ipsa loquitur** simply means that the **jury** may accept or reject the inference of negligence. Likewise it is for the **jury** to accept or reject any explanation. The jury is no more bound by the explanation than by the inference. This Court stated in the case of **Gleeson v. Virginia Railway Company,** 140 U.S. 435, at p. 444:

"The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing

if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility or of the Act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. **And it is for the jury to say in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances.**" (Emphasis supplied.)

Particularly pertinent and convincing is the reasoning of the Supreme Court of Ohio in the leading case in Ohio on **res ipsa loquitur**. **Fink v. New York Central R. Co.**, 144 Oh. St. 1. In that case plaintiff offered evidence of a derailment. Defendant's explanatory evidence was that a stalled car on the tracks caused the derailment. The court held that whether the explanation overcame the inference was a question of **fact** for the jury. The reasoning of the court is found at p. 10:

> "It would be a strange doctrine to say that in a jury trial the court is not permitted to draw the inference of negligence in a case which calls for the application of the rule and then to say that the court could determine as a matter of law that the inferences had been rebutted or destroyed by an explanation offered by the defendant, of the circumstances of the occurrence."

Finally, the majority of the Court of Appeals misinterpreted the reasoning of this Court in the case of **Sweeney v. Erving**, 228 U.S. 233. In referring to the definition of **res ipsa loquitur** contained in the **Sweeney** decision, the Court of Appeals in its opinion (R. 178) omitted the very heart of the definition, namely, "that they (the facts) make a case

to be decided by the jury." A **Complete** quotation of the definition found in **Sweeney v. Erving** is (p. 240 of the opinion):

> "In our opinion, res ipsa loquitur means that **the facts of the occurrence warrant the inference of negligence**, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; **that they make a case to be decided by the jury**, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the **jury** is whether the preponderance is with the plaintiff." (Emphasis supplied.)

The Court of Appeals for the Sixth Circuit confused what constitutes sufficient evidence "to make a case for the jury" with the burden of proof. The decision in **Sweeney v. Erving** was that the permissible inference of negligence under **res ipsa loquitur** does not shift the burden of proof. Of course not! That inference does, however, make a case for the jury. Indeed in **Sweeney v. Erving** the lower court **did** submit the case to the jury and a verdict for defendant resulted. It was plaintiff's contention in that case that the lower court erred in failing to charge that the burden of proof shifted to the defendant. The court held that the burden did not shift. The Court of Appeals, therefore, misinterpreted the **Sweeney v. Erving** rationale and disregarded the most important effect of **res ipsa loquitur**.

**Question 3.**

Respondent's witness, Dr. Ralph Pickett, examined and treated petitioner immediately after the latter had been

hurt (R. 84). X-rays were taken of petitioner's back at the Newark City Hospital at the request of Dr. Pickett. The latter in direct examination stated that he found an "old" compression of the 8th dorsal vertebra. The basis for that opinion, at least in part, consisted of the x-ray reports (R. 84, 85). On cross examination those x-ray reports, made by Drs. Erhard and Piatt and incorporated as part of the Newark City Hospital records, were admitted into evidence (Pl. ex. 4; R. 110, 158) (Pl. ex. 5; R. 113, 159). At the time these exhibits were admitted, the District Court carefully limited their admission to show the information Dr. Pickett had from these specialists (R. 111).

There is, of course, no question but that under any rule of evidence, the reports were admissible on cross examination to show the data upon which Dr. Pickett's opinion was based. This principle is contained in Volume III, **Wigmore on evidence** 3rd Edition, p. 630, Sec. 992(1):

> "The data on which an expert rests his specific opinion (as distinguished from the facts which make him skillful to form one at all) may of course be fully inquired into upon cross examination. Without them, the value of the opinion cannot be well estimated."

Independent of the foregoing, however, these reports were admissible as entries made in the regular course of business under the Federal Shop Book Rule. Title 28 U.S.C., Section 1732.

In denying admissibility of these reports, the Court of Appeals relied upon the decision of this Court in **Palmer v. Hoffman**, 318 U.S. 109, and upon several decisions by Circuit Courts (R. 180).

The decision in **Palmer v. Hoffman** has been misinterpreted by the Court of Appeals. This Court in the **Hoffman** case excluded an accident report made to a railroad for the

sound reason that such a report was not in furtherance of the railroad's business as such, but rather in furtherance of litigation (318 U.S., page 114). Furthermore, this Court soundly observed that reports preserving the litigant's version of an accident would not fall within the scope of those "records which experience had shown to be quite trustworthy" (318 U.S., page 113).

Those objections do not apply to the x-ray reports in this case. Those reports were incorporated into hospital records in the regular course of the business of that hospital, namely, the treatment of patients. Those reports, furthermore, were signed by the doctors who made them, and the hospital report was signed by Dr. Pickett himself (R. 112). It appears, therefore, that these reports were entirely trustworthy; indeed, if they had been slanted at all, certainly they would have been slanted in favor of respondent for whom Dr. Pickett was treating petitioner.

The Circuit Court decisions cited by the Court of Appeals are not determinative. The contents of these x-rays reports consist exclusively of **objective** observation of x-rays with the conclusion in each report based solely upon those objective observations. In each of the cases cited in the opinion of the Court of Appeals (R. 180) the reports and the records contained hearsay statements and history. No such hearsay opinion or history is contained in the pertinent x-ray reports.

The Court of Appeals conceded that a conflict exists among the circuits upon the admissibility of records under the Federal Shop Book Rule. We believe that the x-ray reports were admissible under any of the Circuit Court decisions. There is absolutely no doubt, however, that those reports would be admissible under the following decisions in the Second Circuit: **Korte v. New York, N. H. & H. R.**

**Co.**, 191 Fed. (2d) 86, C.A. 2nd, cert. denied, 342 U.S. 868; **Landon v. United States**, 197 Fed. (2d) 128, C.A. 2nd. The letters admitted in the **Korte** case go far beyond the objective reports on the x-rays in this case (Opinion, pp. 89, 90). Likewise the entries from the hospital record admitted in the case of **Landon v. United States** go far beyond the reports in this case. This is clear from the following holding at page 130 of the opinion:

> "Defendant takes vigorous exception to the admission in evidence of the 'Employee's Treatment Record' from the Medical Department of the plaintiff's employer at Kearny, New Jersey. The doctor in charge of the traumatic section of the company's hospital not only testified to all his treatment of the plaintiff, but also identified the record as one made in the regular course of business of his department. Admissibility appears to come within the very terms of the statute, 28 U.S.C.A., Section 1732, and we are at a loss to find basis for the exception. It is true that he was treated at once by the Roosevelt Hospital in New York City, where he remained for 21 days, and that the record here admitted begins with some recital of the previous case history. (The hospital records from the Roosevelt Hospital were already in evidence.) Further the record reports the diagnosis of another doctor identified by the testifying doctor, who would not himself make the diagnosis, but all this goes only to the weight of the evidence not to its admissibility, as the statute makes abundantly clear."

**Question 4**

This question is moot if our position in the preceding question is correct. In that event the reports were admissible as proof of the contents thereof.

Assuming that the reports were not admissible for that purpose, we submit that respondent was not prejudiced by any comment of the District Court. As we have pointed out, the reports were clearly admissible on cross examina-

tion to show the basis for Dr. Pickett's opinion expressed on direct examination (R. 84, 85). The District Court limited the use of this evidence at the time of admission (R. 111). . .

The jury was, therefore, entitled to those reports in the deliberating room, and the Court's later comments were not prejudicial. In the case of **Masterson v. Pennsylvania R. Co.**, 182 Fed. (2d) 793, cited by the Court of Appeals in its opinion (R. 180), it was held that the improper admission of certain medical letters was not prejudicial to the defendant-appellee.

In this case other evidence supports the conclusion that petitioner's compression fracture was not "old." Petitioner's witness, Dr. Clybourne, testified in response to a hypothetical question that the type of injury petitioner received caused the compression fracture (R. 67). Petitioner testified that he worked as a boilermaker up to the time he was injured on June 22, 1948 (R. 5). Prior to the accident of June 22, 1948, and shortly after a previous injury, petitioner, furthermore, performed the extremely rough job of riveting with an air hammer (R. 46). Dr. Pickett himself testified about the appearance of another fracture after the accident, that of the sixth dorsal vertebra, and then requested that petitioner be sent to respondent's hospital in Baltimore (R. 119). There is, therefore, ample evidence—indeed overwhelming evidence—that the compression fractures of petitioner's back were not "old," but rather a result of the accident of June 22, 1948.

It is indeed significant that after the District Court admitted the x-ray reports over strenuous objection of respondent's counsel, the latter did not see fit to call either x-ray specialist as a witness. This leads to another basis for admitting the reports. They were reports made by spe-

cialists at the request of a doctor retained by respondent. Those reports were incorporated into a hospital record signed by that same doctor. He in effect adopted those reports as his own.

In any event there was no prejudice to respondent in the handling of the x-ray reports. The petitioner should be restored his judgment against respondent.

## VII.

## CONCLUSION.

Petitioner was hurt on June 22, 1948. On May 14, 1952, he was awarded damages of $32,000.00 by the fact-finding body. The District Court was the first to intrude into the realm of the jury when that Court reduced the damages to $22,000.00 as a condition of overruling respondent's motion for a new trial. This unwarranted reduction petitioner accepted rather than to incur the expense and endure the delay of another trial. Petitioner was then forced to wait two more years pending appeal by respondent. The outcome was a further usurpation of the jury's province by the Court of Appeals, along with another trial and more delay.

The Court of Appeals did not expressly rule upon all of the points assigned for review in that Court by respondent. In the conclusion of its brief opposing petition for certiorari respondent complains of petitioner's request for affirmance of the District Court's judgment. Petitioner emphatically repeats that request. At this point, just short of seven years after his injury, he is entitled to his judgment against respondent.

In his petition for certiorari petitioner set forth all the respects in which he had been aggrieved by the decision of

the Court of Appeals. He could do no more. Respondent, on the other hand, complained in its brief that petitioner was granted a second day in court by the decision of the Court of Appeals; yet respondent took no action for cross-writ. As to the points passed over by the Court of Appeals, respondent made no move toward obtaining a decision thereon.

The Court of Appeals obviously gave the cavalier treatment to the points upon which it did not expressly rule (R. 181, 182). The Court did not take those points seriously. When the Court came upon a matter which it considered to be serious (the x-ray reports), the subject was explored fully and the alleged error clearly delineated. Yet the comment concerning those reports, like other claimed irregularities, might or might not recur if a new trial were had.

The record printed in this Court includes the entire transcript of the testimony adduced at the trial, with the exception of the testimony of one W. W. Mitchell. His testimony has no bearing upon this review. The entire charge of the District Court is also included (R. 125-157), along with the complete Statement of Points assigned by respondent for review by the Court of Appeals (R. 161-174). The entire record printed for the appeal to the Court of Appeals was filed with the petition for certiorari.

This Court has dealt with analogous situations by considering and disposing of all alleged errors. In the following cases where a judgment for plaintiff had been reversed by a circuit court without passing upon all of the errors assigned by defendant, this Court made final disposition of the appeal and affirmed the judgment of the district court. **Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.**, 340 U. S. 211, 214, 215; **Story Parchment Company v.**

**Paterson Parchment Paper Co.**, et al, 282 U. S. 555; **Cole v. Ralph**, 252 U. S. 286, 289, 290. In the **Story Parchment Company** case, supra, this Court stated at pages 567 and 568:

> "Other assignments of error made on the appeal from the district court were not considered by the court below. No argument in support of these assignments has been submitted here, and respondents assume that they will be remitted for the consideration of the court below if the judgment of that court be reversed. The entire record, however, is before this court with power to review the action of the Court of Appeals and direct such disposition of the case as that court might have made of it upon the appeal from the district court. Luscher & Moore Lumber Co. v. Knight, 217 U. S. 257, 267; Delk v. St. Louis & S. F. R. Co., 220 U. S. 580, 588. And see Langres v. Green, supra. Accordingly, we have examined these assignments, some eight in number. One or more of these involve questions which have been disposed of by the foregoing opinion. We find nothing in any of the others of sufficient substance or materiality to call for consideration.
>
> The judgment of the court of appeals is reversed and that of the district court affirmed."

In view of petitioner's long wait for his just relief, the manifest errors of the Court of Appeals, petitioner's prosecution of the appeal of all harmful errors to this Court, and respondent's failure to do likewise, this Court should end this litigation and restore to petitioner his judgment against respondent.

Respectfully submitted,

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Attorney for Petitioner.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No. 105

FRANCIS G. A. O'NEILL,
*Petitioner,*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Daily Record Co., Baltimore 3, Md.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### I. OPINION OF THE COURT BELOW

On March 2, 1954, the United States Court of Appeals for the Sixth Circuit in an opinion reported in 211 F. 2d 190 reversed the judgment of the United States District Court for the Southern District of Ohio and remanded the case for a new trial (R. 299). The order of the District Court overruling respondent's motion for a new trial was entered September 8, 1952 (R. 282).

## II. JURISDICTION

The petitioner has invoked the jurisdiction of this Court under the provisions of the Act of June 25, 1948, C. 646, 62 Stat., 928; U. S. C., Title 28, Section 1254 (1).

## III. SUPPLEMENTAL STATEMENT OF THE CASE

Evidence was produced by respondent that petitioner was in charge of the work of installing the ash pan and he had as a helper an employee by the name of Roy Jaynes (R. 53). The helper was operating the pull jack pursuant to the directions of the petitioner (R. 55). Petitioner failed to call Roy Jaynes as a witness. Respondent's witness, Kessler, testified that the practice of the respondent was to buy its nuts and bolts pursuant to specifications and to inspect the nuts and bolts either at the plant of the manufacturer or make the inspection at the storehouse of the respondent (R. 116).

Dr. Ralph Pickett, a witness for the respondent, testified that he was called to the scene of the accident and that he gave petitioner first aid and then took him to the hospital where X-rays were taken of petitioner's back. Dr. Pickett testified that the X-rays revealed that there was an old compression of the eighth dorsal vertebrae which antedated the accident of June 22, 1948 (R. 129).

## IV. SUMMARY OF ARGUMENT

The Court of Appeals for the Sixth Circuit has correctly decided that where a plaintiff offers no evidence pertaining to the issue of negligence other than the statement that an accident happened, and the explanatory facts are sufficient to rebut an inference of negligence, he has failed to meet his burden of proof. On the record presented to it, the Court of Appeals correctly held that a verdict should have been directed for the respondent. The Court of Appeals, contrary to the position of the respondent, has given the petitioner a second opportunity to prepare a better record by granting a new trial. Inasmuch as a new trial was ordered, the Court of Appeals did not pass upon all of the points alleging error. It did, however, correctly find that there was reversible error in the trial court's charge to the jury wherein medical reports, admissible solely for the purpose of discrediting a witness, were treated as positive evidence of the opinions contained therein. In view of the record as a whole, and the Court's charge in particular, the Court of Appeals was compelled to order a new trial, and its decision is not in conflict with the decisions of this Court or Courts of Appeals of other circuits.

## V. ARGUMENT

In deciding that a new trial must be ordered in this case, the Court of Appeals did not pass upon all of the points of error assigned by the respondent. Having decided that petitioner had not made out a case for submission to the jury under the doctrine of *res ipsa loquitur*, the Court dealt sparingly with the other manifest errors in the record. The trial court's charge to the jury (R. 224-244, 257-

262) consisting of 27 pages was made the subject of ten separate exceptions in addition to the general objections to the charge as a whole by the respondent in its appeal to the Court of Appeals. A reading of that rambling, disconnected, and at times incoherent, charge, apart from any other consideration, establishes the need for a new trial in this case. With considerable charity, the Court of Appeals in its opinion (R. 307-308) expressed the hope that by consideration on a retrial the objections to the charge would be eliminated without difficulty. Since a retrial has been ordered, the Court found it unnecessary to rule upon other objections relating to the conduct of counsel and the right of the trial judge to grant a remittitur instead of a new trial (R. 307).

Petitioner has presented four questions urging review by this Court. The first two may be considered together.

### QUESTIONS 1 AND 2

Petitioner contends that the decision of the Court of Appeals is in conflict with the decisions of this Court, and the decisions of the courts of the other circuits. The principal case relied on by the petitioner is the case of *Sweeney v. Erving*, 228 U. S. 233. Petitioner contends under the rule established in this case that if res ipsa loquitur is applicable, it is mandatory for the Court to submit the case to the jury. Petitioner contends that an inference of negligence under res ipsa loquitur means that the jury may accept or reject the explanation offered, but not the Court. These same arguments were advanced in the case of *Gray v. B. & O. R. Co.*, 24 F. 2d 671 (C. A. 7th). The Court after quoting the identical paragraph quoted by petitioner at page 12

of his brief correctly disposed of these arguments. At page 673 of its opinion the Court stated:

> "Taken in connection with the whole paragraph quoted, we understand that, in using the words 'that they make a case to be decided by the jury' the Court meant that, unexplained, the facts make a case for the jury. Otherwise, that clause would be inconsistent with those other clauses, 'it is evidence to be weighed, not necessarily to be accepted as sufficient,' and 'they call for explanation or rebuttal, not necessarily that they require it.'
>
> "If we should hold, under the facts in this case, that on the theory of res ipsa loquitur the case must go to the jury such a holding would not be in harmony with Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597, when the Court resorted to a well known rule:
>
> > " 'The rule for testing the direction of a verdict, as often has been held, is that when the evidence is undisputed, or of such conclusive character that if a verdict were returned to one party, whether plaintiff or defendant, it would have to be set aside in the exercise of sound judicial discretion, a verdict may and should be directed for the other party.' "

In discussing the Sweeney case the Circuit Court of Appeals in the instant case held as follows (R. 304):

> "But, as stated in Sweeney v. Erving, 228 U. S. 233, where the rule is well analyzed, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference, that they furnish circumstantial evidence of negligence where directed evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient, and that other evidence may explain or completely rebut the inference.
>
> "Under the rule the burden of proof does not shift from the plaintiff to the defendant, and if the plaintiff

offers no evidence pertaining to the issue of negligence other than the facts of the occurrence of the injury, and the explanatory facts are sufficient to rebut the inference, the plaintiff fails to meet the burden and fails to make a case. Sweeney v. Erving, supra, p. 241. Where the explanatory evidence is contradictory or of such a character as to justify different inferences as to defendant's exercise of due care, it is for the jury to determine whether the inference of negligence has been rebutted by the explanatory evidence. But where the possible inference of negligence is clearly overcome by undisputed evidence free from any reasonable adverse inference, or where the uncontradicted explanatory facts establish non-liability as a matter of law, it is the duty of the court to direct a verdict for the defendant. The application of the rule does not change the general rule that where the evidence as a whole is insufficient to support a verdict for the plaintiff, defendant's motion for a directed verdict should be sustained."

The instant case is not in conflict with the decision in *Johnson v. United States*, 333 U. S. 46, and *Jesionowski v. Boston & Maine R. Co.*, 329 U. S. 452. In neither of these cases was there uncontroverted testimony which overcame the inference of negligence as a matter of law.

The decision of the Sixth Circuit is not in conflict with the decisions of other courts of other circuits. Two cases are cited by petitioner as being in conflict with the decision of the Sixth Circuit. They are *Atchison, Topeka & Santa Fe Ry. Co. v. Simmons*, 153 F. 2d 206, (C. A. 10), and *Terminal Railroad Assn. of St. Louis v. Staengel*, 122 F. 2d 271 (C. A. 8). In the Atchison case the Court held that if the evidence is so conclusive that the minds of reasonable men cannot differ as to the conclusion to be drawn from the evidence, a directed verdict is justified. In the Terminal Railroad Assn. case the Court held that a directed verdict

should be granted if the entire evidence is such that the presumption cannot stand against it.

The Court of Appeals for the Sixth Circuit correctly held that the facts were undisputed; that the bolt was not manufactured by the appellant; that it was a new bolt selected by petitioner from regular stock which the respondent had purchased from a manufacturer in the usual course of business without notice of any defect; that there was no evidence of any kind in what way it was defective or that it was not a hidden defect, or that the respondent knew or should have known that it was defective and that as a matter of law such a purchaser from a manufacturer is not chargeable with negligence if after passing it on to others in the usual course of business it proves defective (R. 304, 305).

The petitioner concurs in this principle of law but argues that this principle applies between a retailer and purchaser and not to an employer and employee. For obvious reasons no authority is cited by petitioner to support his argument. In the case of *Lowden et al v. Hanson*, 134 F. 2d 348 (C. A. 8th), 1943, the plaintiff was an employer, the defendant a railroad and the action was brought under the Federal Employers' Liability Act. In this case the center spindle of a spring switch stand broke and injured the plaintiff. The Court stated at page 351 of its opinion:

> "The equipment having been purchased from a reputable manufacturer we are clear that this defendant could not be charged with negligence because of any structural or inherent defect which was *not* patent at the time of its installation.
>
> * * * * * *
>
> "Under the undisputed evidence we are of the view that there was no negligence in failing to discover an

> alleged structural defect nor in failing to dismantle and subject the instrumentality to a microscopic inspection, there being no evidence of a custom to submit appliance to such a test."

Petitioner states that the Circuit Court resorted principally to two early decisions of the Sixth Circuit to support the conclusion that the District Court should have directed a verdict. The cases referred to by the petitioner are *Shankweiler v. B. & O. R. Co.*, 148 F. 19[illegible] (C. A. 6) and *Southern Ry. Co. v. Derr*, 240 F. 73, (C. A. 6). Petitioner's statement that said cases do not represent the law today is without merit. Petitioner cites no cases in support of this bold assertion. These cases have been consistently cited without reversal, criticism or qualification. The Shankweiler case and Southern Ry. Co. case have not only been reversed, but they are in accord with the following cases in the Fifth, Seventh, Eighth and Tenth Circuits: *Diecks Lumber & Coal Co. v. Bowen*, 19 F. 2d 732 (C. A. 8); *Gray v. B. & O. R. Co.*, 24 F. 2d 671 (C. A. 7); *Asprodites v. Standard Fruit & Steamship Co.*, 108 F. 2d 728 (C. A. 5); *A. T. & S. F. Ry. Co. v. Simmons*, 153 F. 2d 206 (C. A. 10); *Lowden et al v. Hanson*, 134 F. 2d 348.

The cases of *Gleeson v. Virginian R. R. Co.*, 140 U. S. 435, and *Fink v. N. Y. C. R. Co.*, 144 O. S. 1, cited by petitioner, involved derailments which are entirely different factual situations from the instant case. As stated in *Gray v. B. & O. R. Co.*, supra, at page 674 of the opinion:

> "When the maxim 'res ipsa loquitur' applies the question as to whether the case should be submitted to the jury is one to be determined upon the facts in each case."

### QUESTION 3

Questions 3 and 4 pertain to questions that *may occur* at the retrial of this case and are not proper questions for review. Aside from this, however, the Court of Appeals held that irrespective of Sec. 1732, Title 28 U. S. C. A., the X-ray reports were admissible if a proper foundation is laid. The Court held as follows (R. 306 and 307):

> "Appellee contends that irrespective of the statutory provision the report was admissible on cross-examination of Dr. Pickett to show the data on which Dr. Pickett's opinion was based, and that Dr. Pickett's opinion was not in accord with such data. Where a foundation is properly laid such evidence is admissible on cross-examination for the purpose of discrediting the witness, but the use of such evidence should be strictly limited and the jury carefully instructed about its limited use."

### QUESTION 4

It is admitted by petitioner that it was error for the District Court to comment to the jury on the contents of the X-ray reports. Petitioner, however, states that the error was not prejudical. For the purpose of the retrial the District Court will not want to commit any error regardless of whether it is prejudicial or not. We submit, however, that for the trial court to inform the jury that they had the evidence of the other doctors — doctors who were not called as witnesses, constituted prejudicial error (R. 240 and 241).

## VI. CONCLUSION

Petitioner has asked this Court to reverse the judgment of the Court of Appeals remanding the case for a new trial and to order final judgment for the petitioner in accordance with the judgment of the District Court. This position is taken despite the fact that in ordering a new trial the Court

of Appeals found that it was unnecessary to pass upon all of the assigned points of error. Such action would require this Court to pass upon matters not considered by the Court of Appeals. In granting a new trial, it is submitted that the Court of Appeals has accorded the petitioner the unusual privilege of a second day in court.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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June 28, 1954

Office Supreme Court,
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HAROLD B. WILLEY, C

No. 305.

In the

# Supreme Court of the United States

OCTOBER TERM, 1954.

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FRANCIS G. A. O'NEILL,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

---

## BRIEF OF RESPONDENT ON MERITS.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954.

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No. 105.

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FRANCIS G. A. O'NEILL,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

---

## BRIEF OF RESPONDENT ON MERITS.

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### I.

### QUESTIONS PRESENTED FOR REVIEW.

1. In an action under the Federal Employers' Liability Act where the uncontroverted evidence shows that a heavy ash pan was hoisted by a manual jack operated from above

by another employee of the respondent railroad and that the ash pan fell and struck petitioner, a boilermaker, because a bolt supplied from respondent's stock bin suddenly and without explanation broke, was the District Court correct in submitting the case to the jury on a permissible inference of defendant's negligence under res ipsa loquitur?

2. Did the Court of Appeals for the Sixth Circuit correctly hold that the District Court should have granted respondent's motion for a directed verdict upon the ground that although the evidence reasonably supported an inference of negligence on the part of respondent, such inference was rebutted as a matter of law by evidence that petitioner selected two new bolts from respondent's stock bin and that respondent customarily purchased such bolts from another company?

3. May x-ray reports, made by specialists to respondent's doctor and at his request and incorporated into the records of a hospital, be admitted into evidence on cross examination of that doctor under the provisions of Section 1732, Title 28, U. S. C.?

4. When such x-rays reports were admitted into evidence on cross examination of respondent's doctor to show the basis for the doctor's previously stated opinion on direct examination and were limited by the court to that purpose, was error prejudicial to the respondent committed when the court later commented on those reports to the jury?

5. Should the District Court have sustained defendant's motion to strike all of the testimony of Dr. Harold E. Clybourne from the record and have admonished the jury to disregard said testimony, except as said testimony pertained to the injury to the eighth dorsal vertebra?

6. Did the District Court err in instructing the jury that plaintiff would suffer some humiliation?

7. Did the District Court misstate the rule of res ipsa loquitur in its instruction to the jury?

8. Did the District Court err in instructing the jury that although Jaynes was under the supervision of the plaintiff that that did not make any difference because the assumption of risk is not part of this case?

9. Did the District Court err in instructing the jury to disregard Safety Rule 86 of the defendant?

10. Did the District Court err in instructing the jury regarding an aggravation of a pre-existing injury?

11. Did the District Court err in instructing the jury to disregard the fact that plaintiff received unemployment compensation benefits from the Railroad Retirement Board?

12. Did the District Court make a misstatement of law in charging the jury as follows:

> "Also, as I have heretofore instructed you, if you find by a preponderance of the evidence the defendant was not guilty of negligence which was a direct and proximate cause of the injuries to plaintiff, and you also find that negligence of the plaintiff contributed to his injuries, your verdict shall be for an amount representing the total amount of damages reduced by an amount in proportion to the amount of negligence if any, attributable to plaintiff." (R. 141.)

13. Did the District Court make a misstatement of law in charging the jury as follows:

> "I also perhaps did mention something to the effect that the plaintiff couldn't blindly go ahead. I did that after I had given you the definition of ordinary care. If the defendant's conduct came up to that standard of care which in law is called ordinary care, it was not negligent and it is not liable to this plaintiff no matter what damage resulted from such conduct. That is a repeat of what I just said; if they are not negligent he can't recover from them. But, it is in again. If his conduct fell below such standard of

care then it was negligent, and if such conduct was the direct and proximate cause of the damages complained of, then the plaintiff may recover. Likewise, the plaintiff is required to exercise that degree of care for his own safety that is required of the defendant; that is, ordinary care. And, forget the 'blindly' part. I was just trying to emphasize something. I realize that sometimes you emphasize and give the wrong impression. The definition of ordinary care is what I want you to follow." (R., 153, 154.)

14. Did the District Court err in instructing the jury as follows:

"But, $300 a month is the figure that you would take into consideration and the years that have been outlined, and the percentage of disability covering those years. I give you those figures without building up anything at all, but the matter of damages is for you, taking everything into consideration." (R., 155.)

15. Did the District Court abuse its discretion in commenting on the evidence?

## II.

## SUPPLEMENTAL STATEMENT OF THE CASE.

This case was tried before Judge Francis Picard of the Eastern District of Michigan. Evidence was produced by respondent that petitioner was in charge of the work of installing the ash pan, and he had as a helper an employee by the name of Roy Jaynes (R., 35). The helper was operating the pull jack pursuant to the directions of the petitioner (R., 35). The ash pan was hoisted up part way, and then petitioner testified he and his helper let it back down so that they could get another hold on it (R., 37, 48). After making an adjustment to the chain, the helper started to

hoist the pan, and the bolt broke before the pan was hoisted into position (R., 16). Petitioner failed to call Roy Jaynes as a witness.

Immediately after the accident petitioner was taken to the Newark City Hospital where he was treated. On June 25, 1948 petitioner returned to his employment. (R., 20-21.) Petitioner then reported for work daily until September 14, 1948. (R., 21.) In his complaint petitioner alleged that during this period he performed light duties. (R., 2.) However, in his testimony he stated that he did not perform any duties during this period and that he left this employment on September 14, 1948 because of his inability to perform his work. (R., 21.) He returned to work on February 21, 1949 and performed his regular duties until March 7, 1949 when he was furloughed. He was called back to work on April 4, 1949 and worked until April 8, 1949 when he was again furloughed. After that petitioner applied for and received unemployment compensation benefits from the Railroad Retirement Board until February 25, 1950. He was called back to work by the respondent on September 8, 1949 but failed to return. However he continued to apply for and receive unemployment compensation from the Railroad Retirement Board. (R., 43.)

Petitioner testified that at the request of his attorney he was examined by Dr. Clybourne on three different occasions so that the doctor could testify in his behalf in this case. He stated that the doctor took a case history on three different occasions for the purpose of making a diagnosis. The petitioner stated that he did not tell Dr. Clybourne anything about a previous nervous and goiter condition or the fact that he had sustained three injuries prior to June 22, 1948; one on June 11, 1947 to his eye, a fracture of his left hip on August 24, 1947,

and a subsequent back injury for which he was off work for over 3 weeks. Petitioner admitted that he told nothing about these injuries to Dr. Clybourne but admitted that he informed Dr. Pickett, the company doctor, on the day of the accident about his previous back injury. (R., 33, 34.)

Dr. Clybourne testified that he had examined petitioner on three different occasions at the request of counsel for the petitioner and not for the purpose of treatment. (R., 75.) Dr. Clybourne testified that X-rays taken at the first examination on August 1, 1949 showed a compression fracture of the eighth dorsal vertebra. On cross examination Dr. Clybourne testified that he took a complete history from the petitioner and went at him from different angles on three different occasions and reviewed the histories carefully so that there would be no discrepancies. However, Dr. Clybourne admitted that the petitioner did not tell him about his back injury which had occurred prior to June 22, 1948. On this point Dr. Clybourne testified as follows:

> "Q. Now, did he tell you about having had a back injury prior to the occurrence of June 22, 1946? He didn't did he? A. No, no, he did not." (R., 73.)

Dr. Ralph Pickett was called as a witness for the respondent and he testified that he was called to the scene of the accident and that he gave petitioner first aid and then took him to the hospital where X-rays were taken of petitioner's back. Dr. Pickett testified that the X-rays revealed that there was an old compression of the eighth dorsal vertebra which antedated the accident of June 22, 1948. (R., 85.)

Respondent's witness Kessler testified that the practice of the respondent was to buy its nuts and bolts pursuant to specifications and to inspect the nuts and bolts either at the plant of the manufacturer or make the inspection at the storehouse of the respondent. (R., 78.)

## III.

## SUMMARY OF ARGUMENT.

The Court of Appeals for the Sixth Circuit has correctly decided that where a plaintiff offers no evidence pertaining to the issue of negligence other than the statement that an accident happened, and the explanatory facts are sufficient to rebut an inference of negligence, he has failed to meet his burden of proof. On the record presented to it, the Court of Appeals correctly held that a verdict should have been directed for the respondent. The Court of Appeals correctly held that no inference could be drawn that petitioner's helper used improper and excessive force in operating the pull jack. (R., 176.) The Court of Appeals correctly held that an inference of a defective bolt was rebutted as a matter of law by the undisputed evidence that the bolt was a new bolt, and that it was purchased by respondent, in the usual course of business without notice of a defect. (R., 179.) The Court of Appeals correctly held that X-ray reports containing opinions, conclusions and analysis by doctors are not admissible under the Federal Shop Book Rule, Title 28, U. S. C. Section 1732. (R., 180.) The Court of Appeals correctly held that the X-ray reports were admissible to show the data on which Dr. Pickett's opinion was based when the proper foundation was laid, providing the court properly limited the use of such evidence. (R., 181.) The Court of Appeals correctly held, however, that it was error for the court to comment on the reports to the jury as being substantive testimony concerning the injury. (R., 181.)

The hypothetical question to Dr. Clybourne related only to an injury to the eighth dorsal vertebra. (R., 67.) There-

fore, all testimony of Dr. Clybourne that did not pertain to the eighth dorsal vertebra should have been stricken from the record, and the jury instructed to disregard it.

The District Court erred in its instruction to the jury in injecting the issue of humiliation into the case as an element of damages when it was not an issue in the case (R., 140, 141, 153); misstated the rule of evidence known as res ipsa loquitur, and caused such confusion in the minds of the jury that they could not possibly know what res ipsa loquitur meant (R., 133-138, 153); erred in instructing the jury that although the helper was under petitioner's supervision, this did not matter because the assumption of risk was not an issue in the case (R., 136); erred in instructing the jury to disregard a safety rule of the respondent that prohibited an employee, such as petitioner, from working under a load being hoisted by a mechanical device (R., 137); erred in charging the jury regarding a pre-existing injury when that was not an issue in the case (R., 139); erred in charging the jury that they should disregard the conditions under which petitioner received unemployment compensation benefits when it was agreed that he had to certify each time he received his weekly check that he was able and willing to work (R., 25, 26, 140); erred in charging the jury that if they found the respondent not guilty of any negligence and the petitioner guilty of contributory negligence, they could still return a verdict for the petitioner (R., 141); erred in instructing the jury that if petitioner's conduct fell below such standard of care, then respondent was negligent (R., 153, 154); erred in instructing the jury to use the figure of $300.00 per month for 24.10 years in computing damages when the evidence was that petitioner immediately prior to the accident earned around $285.00 or $300.00 a month, and

petitioner's counsel had read into the record that the table showed that the petitioner had a life expectancy of 24.10 years (R., 155); abused its discretion in commenting on the evidence by stressing and overemphasizing petitioner's theory of the case, while at the same time completely nullifying respondent's theory of the case.

Since the retrial was ordered, the court found it unnecessary to rule upon the objections relating to the conduct of counsel for petitioner in his argument to the jury and the right of the trial judge to grant a remittitur instead of a new trial. This portion of the record is not before this court unless the court refers to the complete record filed with the petition for certiorari as suggested by petitioner. In view of the court's charge alone, the Court of Appeals was compelled to order a new trial.

## IV.

## ARGUMENT.

**1. In an action under the Federal Employers' Liability Act where the uncontroverted evidence shows that a heavy ash pan was hoisted by a manual jack operated from above by another employee of the respondent railroad and that the ash pan fell and struck petitioner, a boiler-maker, because a bolt supplied from respondent's stock bin suddenly and without explanation broke, was the District Court correct in submitting the case to the jury on a permissible inference of defendant's negligence under res ipsa loquitur?**

**2. Did the Court of Appeals for the Sixth Circuit correctly hold that the District Court should have granted respondent's motion for a directed verdict upon the ground that although the evidence reasonably supported an inference of negligence on the part of respondent, such inference was rebutted as a matter of law by evidence that petitioner selected two new bolts from respondent's stock bin and that respondent customarily purchased such bolts from another company?**

Petitioner contends that the jury could properly infer that excessive and improper application of force from the helper, Jaynes, caused the bolt to break and the pan to fall. An examination of petitioner's testimony readily reveals there could not possibly be an inference of improper or excessive application of force by the petitioner's helper. (R., 4-48.) Petitioner testified as follows:

> "Q. And, the position that the court just referred to is the position so that you can do what with this ash pan? A. To steady it and get it up into position.

Q. What is the position, what does that mean? A. to go on up with it.

Q. To where? A. Up to fasten on to the ash pan wing.

Q. When you get it in that position, then what are you able to do? How do you fasten it to the engine? A. If we had got it into position we would have fastened it through the half-inch holes into the ash pan wing, and the half-inch holes were into the ash pan where they come together and would place half-inch bolts between there to hold it.

Q. Now, did you get it in that position? A. No, sir.

Q. What happened? A. The bolt broke and down came the pan. * * *" (R., 15.)

Petitioner's testimony conclusively proves that petitioner's helper did not use improper of excessive force in hoisting the ash pan. The ash pan was dangling on the chain, and petitioner was guiding it, and the bolt broke before the pan was hoisted into position.

Petitioner contends that the permissive inference of a defective bolt was not rebutted as a matter of law. Petitioner argues that even though he selected a new bolt, this did not have anything to do with the case. It certainly did have something to do with the case. It established the fact that the bolt was a **new** bolt. Respondent's witness, Kessler, testified that it was the practice of the respondent to purchase its bolts pursuant to specifications and inspect the bolts either in the plant of the manufacturer or in the shops of the respondent. (R., 78). This uncontroverted evidence established that it was the respondent's habitual and established method of doing business to purchase its bolts pursuant to specifications and inspect them either in the plant of the manufacturer or in the shops of the respondent. This

uncontroverted testimony established the fact that the new bolt selected by the petitioner was purchased and inspected in this same manner.

Petitioner states that even if there is uncontroverted explanatory facts, the court still cannot direct a verdict in a res ipsa case. This is not the law and is even contrary to the cases cited by petitioner: Chicago & N. W. R. Co. v. Green, 164 Fed. 2d 55; Propper v. Chicago R. I. & P. R. Co., 54 N. W. 2d 840; Atchison, T. & S. F. Ry. Co. v. Simmons, 153 Fed. 2d 206; Terminal Railroad Association of St. Louis v. Staengel, 122 Fed. 2d 271. See also the following cases where it is held that any initial inference of negligence is entirely rebutted by undisputed, explanatory evidence; Shankwiler v. B. & O. R. Co., 148 Fed. 2d 195, C. A. 6th; Dierks Lumber & Coal Co. v. Brown, 19 Fed. 2d 732; C. A. 8th; Gray v. B. & O. R. Co., 24 Fed. 2d 671, 673-674, C. A. 7th; Asprodites v. Standard Fruit & Steamship Co., 108 Fed. 2d 728, C. A. 5th; Black Mountain Corp. v. Partin's Admr., 243 Ky. 791, 796-800; Dunning v. Ky. Utilities Co., 270 Ky. 44; Roanoke R. & Electric Co. v. Sterrett, 108 Va., 533, 62 S. E. 385; Christensen v. Oregon Short Line R. Co., (Utah) 99 Pac. 676.

The case of Lavender v. Kurn, 327 U. S. 645, cited by petitioner is not in point because the evidence in that case was conflicting and capable of different inferences. The cases of Gleeson v. Virginia R. R. Co., 140 U. S. 435, and Fink v. N. Y. C. R. Co., 144 O. S. 1, cited by petitioner, involved railroad passengers injured by derailments which are entirely different factual situations from the instant case.

Petitioner states that the court misinterpreted the reasoning of this court in the case of Sweeney v. Erving, 228 U. S. 233. Petitioner contends that this court held that once an

inference of negligence has arisen, no matter what the explanation is, the court cannot direct a verdict, but must submit the case to the jury. These same arguments were advanced in the case of Gray v. B. & O. RR. Co., 24 Fed. 2d 671 (CA 7th). The court correctly disposed of these arguments and at page 673 of its opinion stated:

> "Taken in connection with the whole paragraph quoted, we understand that, in using the words 'that they make a case to be decided by the jury' the Court meant that, unexplained, the facts make a case for the jury. Otherwise, that clause would be inconsistent with those other clauses, 'it is evidence to weighed, not necessarily to be accepted as sufficient,' and 'they call for explanation or rebuttal, not necessarily that they require it.'
>
> "If we should hold, under the facts in this case, that on the theory of res ipsa loquitur the case must go to the jury such a holding would not be in harmony with Small v. Lamborn, 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597, when the Court resorted to a well known rule:
>
> "'The rule for testing the direction of a verdict, as often has been held, is that when the evidence is undisputed, or of such conclusive character that if a verdict were returned to one party, whether plaintiff or defendant, it would have to be set aside in the exercise of sound judicial discretion, a verdict may and should be directed for the other party.'"

Unsupported by any authority, petitioner makes the broad assertion that respondent is liable for a negligent defect in its equipment, new or old, and whether purchased from others or not. Petitioner has not attempted to answer the well considered opinion of the Circuit Court in this case, nor has he discussed the cases cited by the Circuit Court. (R., 179.)

**3. May x-ray reports, made by specialists to respondent's doctor and at his request and incorporated into the records of a hospital, be admitted into evidence on cross examination of that doctor under the provisions of Section 1732, Title 28, U. S. C.?**

**4. When such x-rays reports were admitted into evidence on cross examination of respondent's doctor to show the basis for the doctor's previously stated opinion on direct examination and were limited by the court to that purpose, was error prejudicial to the respondent committed when the court later commented on those reports to the jury?**

The Circuit Court of Appeals held that it was error to admit in evidence the separate written reports of two doctors, which contained their opinions and conclusions of the x-ray films of the injury. By admitting these reports (Pl. Ex. 4; R., 110, 158, Pl. Ex. 5; R., 113, 159), the trial court forced the respondent to offer two additional expert witnesses who were not under oath and who were not subject to either direct or cross examination. The jury took these two witnesses—their medical reports—to the jury room during their deliberations. The Circuit Court correctly held that any effect of the trial judge's admonition at the time the reports were offered and received as evidence was nullified by the following discussion of this evidence by the trial court in its charge to the jury (R., 139.):

> "Now, Doctor Pickett, who was the company doctor, had some other x-rays taken about three or four months later, wasn't that it, from June to September, and Doctor Pickett got reports from these two doctors. The court permitted that testimony when they brought the hospital record here, and under any circumstances, I think, the court should have permitted it. But one of those doctors, I have forgotten which one, said that while he thought it was an old injury, he would not rule out some other theories, that it was not an old

injury. And the other doctor, as I remember, sat on the fence, I think, even more than the other. Isn't that true? So you have got plenty of evidence here (fol. 241) that it is an old injury and not something that happened then, and you have testimony that shows that you can't rule out entirely that it was not an old injury. In other words, this jury can find from the testimony here, depending upon which you believe, with the knowledge that this man admits that in '45 or '46 he did suffer an injury, that he has been off the railroad at different times since, but that he was doing his work at that time and had been on the job for some time. You take it all into consideration."

The Circut Court of Appeals held that these medical reports were not admissible as entries of acts or occurrences made in the regular course of business under the Federal Shop Book Rule. Title 28, U. S. C., Section 1732. Petitioner claims that the court was in error, since these records were part of the hospital record of the petitioner and, therefore, admissible per se. Petitioner in effect contends that it is immaterial under the Federal Shop Book Rule whether the record is a statement of an "act" or "occurrence," or whether it also contains the conclusions or opinions concerning such "act" or "occurrence" either performed or observed by the person making the record. Petitioner's logic completely ignores the ruling of this court in Palmer v. Hoffman, 318 U. S. 109, that the test of admissibility must be "the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation."

The United States Circuit Court of Appeals for the District of Columbia clearly sets forth the type of documents or records admissible or inadmissible under the Federal Shop Book Rule in the case of New York Life Insurance Co. v. Taylor, 147 F. (2d) 297. In holding that it was error

to admit into evidence under the rule records that give an opinion or a diagnosis, the court said:

> "To admit a narrative report of an event, or a conversation, or a diagnosis, as a substitute for oral testimony, is to give any large organization the right to use self-serving statements without the important test of cross examination. Cross examination is unimportant in a case of systematic routine entries made by a large organization where skill of observation or judgment is not a factor. We believe that Palmer v. Hoffman restricts the application of the Federal Shop Book Rule statute to that type of business entries."

In the appeal after the second trial of the issue, the defendant again claimed that the court erred in excluding certain hospital records. New York Life Insurance Co. v. Taylor, 158 F. (2d) 328. The court stated that they had thoroughly discussed this question on appeal from the first trial and upon the motion for rehearing. The court, however, said at page 329 of its opinion:

> "But, in the interest of clarification, we deem it proper to add that our former decision does not hold that hospital records, per se, are inadmissible under the Federal Shop Book Rule. In both trials below dozens of such records were received, and only those rejected which constituted hearsay, opinion or diagnosis, about which equally competent men could differ, and as to which cross examination is necessary in eliciting the truth."

After claiming that the separate written reports of the two doctors are admissible merely because they were incorporated into the hospital records, petitioner alleges the records are also admissible merely because they are "trustworthy." They are "trustworthy" in petitioner's opinion because: (1) they were signed by the doctors themselves, and (2) the hospital record was signed by Dr. Pickett, the respondent's witness. Respondent makes no claim that the

pinions, conclusions and analysis made by the doctors were ishonest or slanted either in its favor or disfavor. They re inadmissible because they express the conclusions and pinions of doctors who were not called upon as witnesses nd which the respondent had no opportunity to cross xamine as to the basis or foundation of such conclusions. t is submitted that the Federal Shop Book Rule should not e extended to matters where observation, opinion and udgment are factors, and we believe this court has so re-tricted the rule in Palmer v. Hoffman.

Petitioner argues that even if the Circuit Court of Appeals was correct in excluding the written reports, nevertheless their admission was not prejudicial to the respondent. In support of his contention he claims that there was ample evidence that the compression fractures of petitioner's back were not old fractures. It will be noted that petitioner presented only two medical witnesses. Dr. Ridgeway, the first of these witnesses, stated that he first saw petitioner only three days before the trial, which was almost four years after the accident. (R., 49.) He testified on inquiry from the trial judge that he could not tell by looking at the X-rays whether the compression had come on in the last two or three years or ten years ago, and, therefore, he had to rely on what the patient told him. (R., 55.) Dr. Clybourne, the only other medical witness of the petitioner, testified by way of deposition that he first saw petitioner on July 27, 1949, over a year after the alleged incident (R., 57); that he relied on the case history given by petitioner (R., 71, 72), and that from the X-rays alone he could not tell "what date the thing was hurt". (R., 72.) The sole medical testimony of petitioner was based on petitioner's own statements as to when and where his compressed fractures occurred. Only Dr. Pickett, the respondent's witness,

saw petitioner immediately after the accident. In view of the lack of competent medical evidence presented by the petitioner, it is impossible to comprehend his contention that there was overwhelming evidence that the compression fractures aof petitioner's back were a result of the accident of June 22, 1948. His lack of medical evidence clearly shows the prejudice to this respondent, when the trial court not only admitted records of opinions and conclusions of doctors who were not present at the trial, but told the jury that they should take into consideration the opinions and conclusions expressed by these doctors in their records.

The petitioner's final contention is that these reports are admissible since they were made by specialists at the request of a doctor retained by respondent and that, therefore, the doctor adopted them as his own. There is nothing in the record to show that Dr. Pickett adopted the records as his own. In fact, the record shows that he disagreed with the diagnosis and opinions set forth in the report of Dr. Erhard. (R., 116.)

**5. Should the District Court have sustained respondent's motion to strike all of the testimony of Dr. Harold E. Clybourne from the record, and have admonished the jury to disregard said testimony, except as said testimony pertained to the injury of the eighth dorsal vertebra?**

After Dr. Ridgeway testified, counsel for petitioner, to conclude his case, read the deposition of Dr. Harold E. Clybourne. Dr. Clybourne testified that he had examined the petitioner on three different occasions at the request of counsel for petitioner for the purpose of testifying and not for the purposes of treatment. (R., 75.)

Dr. Clybourne testified that petitioner had a splinting of the entire spine on motion with pain developing in the mid-

dorsal area; that palpatory examination showed that the spinus processes of the sixth, seventh and eighth dorsal spines were sensitive to palpation, and that they would not move on side bending or torsion; that there was a fixation of the sixth, seventh and eighth ribs on the right side; that there was intercostal nerve involvement in the right side; that the intercostal nerve pain was aggravated by any type of motion; that the fixation of the ribs caused a sharp, stabbing pain along the course of the nerve as the stress was thrown in that area; that on the examination of August 1, 1949 petitioner had a marked intercostal neuritis on the right side involving the seventh, eighth and ninth intercostal nerves; that spondylitis had extended not only down the spine but it had gone up the spine into the lower cervical, or neck area; that his whole spine was sore; and that petitioner had a permanent disability of the spine of fifty per cent. (R., 58, 59, 62, 64, 66.)

At the conclusion of Dr. Clybourne's testimony, counsel for petitioner asked the following hypothetical question:

> "Q. I believe I neglected to ask you this question: Assuming that Mr. O'Neill on June the 22nd, 1948, while engaged in his employment with the B. & O. Railroad was standing in a crouched position in a pit with his hands elevated to guide an ash pan which gave way striking Mr. O'Neill about the face and body, wedging him against the pit in the portion of the engine, I will ask you whether or not the condition that you found on the occasion of your first examination **with respect to the condition of the eighth dorsal vertebra**, whether or not that condition was in any way associated with the injury of the—on June the 22nd, 1948, as related by you?" (R., 67.) (Emphasis ours.)

Since the hypothetical question pertained only to the condition of the eighth dorsal vertebra, all of Dr. Clybourne's testimony, except as it pertained to the eighth dorsal ver-

tebra, should have been stricken from the record pursuant to respondent's motion, and the jury instructed to disregard the same.

In so far as the eighth dorsal vertebra was concerned, Dr. Clybourne testified that the condition of said vertebra was as follows on August 1, 1950:

> "Q. I will ask you if you had occasion to examine Mr. O'Neill any time subsequent to that date? A. Yes, I examined him 8-1-50 at Doctors Hospital.
>
> Q. All right. Now, will you tell us, Doctor, what your examination disclosed at that time with reference to the eighth dorsal vertebra? A. We showed the anterior wedging of the eighth dorsal vertebral body and it showed that the fracture was well healed at the present time—at the time of the examination." (R., 64.)

The court should have instructed the jury that they could only consider Dr. Clybourne's testimony as it pertained to the eighth dorsal vertebra and they should have been instructed to disregard the rest of his testimony. The prejudice to the respondent is apparent.

**6. Did the District Court err in instructing the jury that petitioner would suffer some humiliation?**

The court's charge to the jury was as follows:

> "There is no humiliation that I can think of, except where a man is physically unable to do a whole day's work. If that is what is meant by humiliation, yes. Both in the past and what may be reasonably anticipated in the future." (R., 140 and 141.)

The respondent excepted to the court's charge and after the jury was recalled, the court charged the jury as follows:

> "Now, there is a question of humiliation here. The word was used. It happened because **I was quoting from another charge.** I think that you understood

the limitation I put upon humiliation, and that is the humiliation that comes when a young man, a comparatively young man, fifty, is unable to do a full day's work at his job. That is all. That is a humiliation. I don't think that there is any other humiliation, and personally, I don't think that's a great deal of humiliation, either." (R., 153.) (Emphasis ours.)

The charge the court was quoting from involved a case where the petitioner had lost an arm, and humiliation was an element of damages. In the instant case, the petitioner made no claim for damages for humiliation. This was not an issue in the case and it was prejudicial error for the court to instruct the jury on this element of damages.

**7. Did the District Court misstate the rule of res ipsa loquitur in its instruction to the jury?**

The court both misstated the rule and so confused the jury as to the purpose and intent of the rule that the respondent was in fact charged out of court. After stating that the "doctrine of res ipsa loquitur applies in this kind of a case" (R., 134), the court charged the jury as follows:

"The Court: What does that mean? Does that mean that the plaintiff is entirely absolved from showing negligence? No, but it recognizes, and these states that have this doctrine recognize this: That sometimes you can't prove negligence is in somebody else's possession. You can't prove it. It is there but you can't prove it. Or, it may not be there. I don't say it is necessarily there. Don't understand me as saying that. And so, they have this rule that says, 'The thing speaks for itself.'

You go down the street and you see a locomotive—I will get away from a locomotive—you see an automobile on somebody's front porch. Now, in Michigan you would have to show the negligence there, you see. But under this rule you don't have to show the negligence, if it answers these three requirements: That

the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; third, it must not have been due to any voluntary action or contribution on the part of the plaintiff. Now, that does not mean any contribution at any one time, but as the accident happened.

The Supreme Court of the United States has defined res ipsa loquitur. It means 'that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference'. So you can, from the facts in this case, infer that there was negligence that caused it somewhere. You see, you can infer that. You can infer that the negligence was entirely on the part of the defendant. You can infer from what happened that there was no negligence on the part of the defendant, or you can infer that there was no negligence on the part of the plaintiff.

When you get in there you begin saying, 'Well, here is what happened.' Nobody saw the bolt break, as I understand, and there is no evidence here whether or not it was a defective bolt necessarily, and there is no evidence one way or the other whether the man who was up above did something he shouldn't have done, by exerting a certain pressure at a certain time. But, you have the right to infer that, or, you have the right to say, 'This is entirely due to the negligence of the plaintiff in this case.'

I go on with the definition of res ipsa loquitur: '* * * that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that the facts call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict.' I don't know how I can explain it to you any better than in the language of the Supreme Court." (R., 134, 135.)

* * * * * * * * * *

"Now, it is up to you to determine whether or not they are guilty of negligence, and under the doctrine

of res ipsa loquitur they don't have to prove to you where the negligence lies, I mean the exact nature of the negligence. You can, from the thing itself, determine if there was negligence and what the negligence was; that is, unless it has been rebutted by some testimoney here of the defendant." (R., 137, 138.)

* * * * * * * * * *

"Remember that I have said all the way through that the plaintiff must prove the negligence, but in a case of this kind you may infer negligence if you believe that the facts so warrant.

Now, the court said it couldn't see how this man could have performed his work in any other manner. If you jurors think he could, from the evidence as you know it, that is up to you and you are not to be biased by what I think the facts show at all. You are the judges of the facts, not me. The evidence, of course, in some cases is really, perhaps, more complete, but that is what makes, in my opinion, this case a case of res ipsa loquitur. Let the thing speak for itself." (R., 154.)

In the foregoing portion of its charge regarding res ipsa loquitur, the court says that the ruling is applicable in a case where you can't prove negligence and that the proof is in somebody else's hands. That "somebody else" can refer to no one except the defendant in this case. The jury could not interpret this language other than a directive to it that the respondent has the burden of proving it was not negligent. The court then says that the reason the petitioner does not have to prove negligence is that "the thing speaks for itself." The court at no time states what "thing" he is referring to. The jury could reasonably infer from the court's statement that the fact that the petitioner was injured is the thing that speaks for itself—or that because the petitioner was in an accident, the thing speaks for itself —or that the fact that the petitioner brought this action against the respondent is the thing that speaks for itself.

As stated by Mr. Justice Holmes in Southern Railway Co. v. Bennett, 233 U. S., 80:

> "The instruction is criticized further as if the charge had said **res ipsa loquitur**—which would have been right or wrong according to the **res** referred to."

Here the court made no attempt to instruct the jury as to the res—or thing he is referring to as speaking for itself. The language of the court is confusing and misleading and the error is patent.

The court then attempts to give what he calls an illustration of the rule—"You go down the street and you see a locomotive—I will get away from a locomotive—you see an automobile on somebody's front porch."—In such a case the court states that under the law of Michigan you would have to prove that somebody was negligent but that under this rule you don't have to show the negligence. When counsel for the respondent objected to this illustration because of its complete inapplicability to any facts of the record or as illustrating this rule of evidence, the court reinstructed the jury as follows:

> "Now, you remember, I tried to give you an example, tried to show the difference between this kind of a case where I feel the doctrine of res ipsa loquitur applies and one where it does not, and I gave you a situation of an automobile running up on a front porch. Well, there is no automobile in this case, ladies and gentlemen, and there is no front porch, so far as I know. I just tried to give you an example. So, you can forget the automobile on the front porch as though I never said it to you at all. You can forget it entirely." (R., 152.)

Now, whereas the court in instructing the jury had given the situation of the automobile being on the front porch as an example of illustrating the rule of res ipsa loquitur, in recharging the jury he informed the jury that it was

not intended as an example. From the aforesaid, it can readily be seen that the jury had no conception as to the application of the rule from the instructions given to them by the court. In fact, the instruction of the court was misleading, confusing and erroneous.

In quoting from the Supreme Court of the United States in the case of Jesionowski v. Boston & Main R. R., supra, as to the meaning of res ipsa loquitur, the court again did not define the res or thing that he was referring to.

The court completed its charge on res ipso loquitur by again reading from the decision of the Supreme Court of the United States in the Jesionowski case. It is not necessary to comment upon the impropriety of reading an appellate case and reading that part of the decision which holds that it makes a case to be decided by the jury, not that it forestalls a verdict that has been granted for the plaintiff in the case.

**8. Did the District Court err in instructing the jury that although Jaynes was under the supervision of the petitioner, that did not make any difference because of the assumption of risk is not part of this case?**

The court instructed the jury as follows:

> "Two men were working on this job, and there is no question but what the man up above was under the supervision of the plaintiff here, but I instruct you now that that does not make any difference because the assumption of risk is not a part of this case. He does not assume the risk of a fellow employee." (R., 136.)

The court clearly stated that the evidence was uncontraverted that Jaynes, the helper, was under the direct supervision of the petitioner. However, the court stated that such fact was not material as the assumption of risk was

not part of this case. The charge was erroneous, misleading and completely confusing for the following reasons: First of all, the assumption of risk was no more an issue in this case than was an action for breach of contract. Furthermore, the court failed to differentiate between assumption of risk, sole negligence and contributory negligence. It will be noted how peculiarly prejudicial this charge was to the respondent as the court at no time defined assumption of risk. Under this charge, the jury was undoubtedly misled into believing that the action of the helper, Jaynes, who was subject to the petitioner's supervision, even though instructed by the petitioner, had no bearing on the petitioner's right to recover. By so charging, the court effectively erased from the jury's consideration any question bearing on contributory or sole negligence.

**9. Did the Court of Appeals correctly hold that the District Court was right in ruling that Safety Rule 86 was not applicable to the petitioner?**

The court instructed the jury to disregard Safety Rule 86. (R., 137.) On cross examination the petitioner admitted the violation of Safety Rule 86. (R., 46.) On cross examination, petitioner admitted that he placed a pit board across the tracks after the bottom of the pan cleared the pit. (R., 37.) Petitioner further testified on cross examination that after the pan was jacked up to the approximate position where he wanted it he could have placed blocks under the ash pan. (R., 39, 40.)

Safety Rule 86 was an issue in the case. The rule was adopted to cover just such a situation as this. The petitioner was working under an ash pan which was being hoisted in the air by a mechanical device. Petitioner even

testified he could not see the operator of the hoist above him. What more dangerous situation could there be? Petitioner admitted he was familiar with Rule 86. (R., 46.) He testified that he put a board across the pit after the pan cleared the pit so he could put the pan back down on it. This illustrates that if he had had any interest in his own safety, he would have put some blocks under the pan as it was being hoisted. How could the court find that the rule was not intended to cover such a situation? The rule is plain and unambiguous, and was adopted to prevent men from working under loads being hoisted by a mechanical device. The rule was adopted to prevent accidents to employees such as the petitioner. The District Court should have instructed the jury regarding this rule, instead of telling them to disregard it.

In the case of Lasagna v. McCarthy, et al., 111 Utah 269, 177 P, 2d, 734 certiorari denied 68 S. Ct., 205, 332 U. S. 829, 92 L. Ed. 403 the court held that the railroad was not liable for injury to a car inspector where the injury was caused by the car inspector's own violation of a published safety rule requiring a blue flag to be placed on the track where men are working around cars.

In the case of Chicago, St. P., M. & O. R. Co. v. Arnold, decided by the Circuit Court of Appeals, Eighth Circuit, March 24, 1947, 160 F. (2), 1002, plaintiff sustained injuries when the car on which he was riding failed to clear spotted cars on a side track. The court held that it was reversible error for the trial court to refuse to instruct the jury that if the jury found that plaintiff's superior gave timely warning to him that there was not sufficient clearance to permit a man to ride a car past the spotted cars then the verdict must be for the railroad.

**10. Did the District Court err in instructing the jury regarding an aggravation of a pre-existing injury?**

The court charged the jury as follows:

> "That is not disputed; it is not disputed that the man has that injury; the extent of it, however, is disputed. I have forgotten the medical term that they used—oh, yes, a compression fracture." (R., 139.)

The court erred in instructing the jury that it was not disputed that the petitioner had an injury to his eighth dorsal vertebra, but that the extent of the injury was disputed. There is no testimony in the record of an aggravation of a pre-existing injury, and that was not an issue in the case. Respondent offered testimony to show that the injury to the eighth dorsal vertebra was an old injury. Petitioner attempted to prove that the fracture of the eighth dorsal vertebra occurred on June 22, 1948, and made no claim for aggravation of a pre-existing injury.

The court, by this instruction, brought an issue into the case which was not supported by the evidence, to the prejudice of the rights of the respondent.

**11. Did the District Court err in instructing the jury to disregard the fact that petitioner received unemployment compensation benefits from the railroad retirement board?**

The court charged the jury as follows with respect to the receipt of unemployment compensation benefits. (R., 140.)

> "There is no evidence about this compensation except that he got it. There is no evidence of the conditions of it or anything else."

This instruction was prejudicial to the rights of respondent and was contrary to the stipulation of counsel made in

open court, and contrary to the court's instruction regarding the stipulation, which was as follows:

> (Discussion between counsel and the court.)
> "The Court: There is a difference, ladies and gentlemen, except in this. Counsel are agreed that under the Federal Employer's Liability Act that you must, if you get unemployment compensation—what happens to it afterwards is something else—**you must assert that you are able and willi[illegible] to work.**" (R. 25, 26.) (Emphasis ours.)

One of the respondent's defenses was based on the fact that petitioner had drawn unemployment compensation benefits from the United States of America during the period from April 8, 1949, until February 25, 1950 and that, during said period, certified each week that he was able and willing to work. (R., 43.)

The court, by instructing the jury to disregard the question of unemployment compensation benefits, completely obliterated this issue from the case, to the prejudice of the rights of the respondent.

**12. Did the District Court make a misstatement of law in charging the jury as follows:**

> "Also, as I have heretofore instructed you, if you find by a preponderance of the evidence the defendant was not guilty of negligence which was a direct and proximate cause of the injuries to plaintiff, and you also find that negligence of the plaintiff contributed to his injuries, your verdict shall be for an amount representing the total amount of damages reduced by an amount in proportion to the amount of negligence if any, attributable to plaintiff." (R., 141.)

The error in this charge is apparent on its face. The court charges that even if the respondent was not negligent in any manner toward the petitioner, nevertheless the petitioner can still recover even if he was solely negligent. We

believe no comment is necessary on the prejudicial error in this charge.

**13. Did the District Court make a misstatement of law in charging the jury as follows:**

> "I also perhaps did mention something to the effect that the plaintiff couldn't blindly go ahead. I did that after I had given you the definition of ordinary care. If the defendant's conduct came up to that standard of care which in law is called ordinary care, it was not negligent and it is not liable to this plaintiff no matter what damage resulted from such conduct. That is a repeat of what I just said; if they are not negligent he can't recover from them. But, it is in again. **If his conduct fell below such standard of care then it was negligent, and if such conduct was the direct and proximate cause of the damages complained of, then the plaintiff may recover.** Likewise, the plaintiff is required to exercise that degree of care for his own safety that is required of the defendant; that is, ordinary care. And, forget the 'blindly' part. I was just trying to emphasize something. I realize that sometimes you emphasize and give the wrong impression. The definition of ordinary care is what I want you to follow." (R., 153, 154.) (Emphasis ours.)

Here again the error in this charge is apparent on its face. The jury is instructed that if the petitioner's conduct fell below such standard of care, then the respondent was negligent, and if such conduct was a direct and proximate cause of the damages complained of, then the petitioner may recover. The jury could not help being totally confused as to the law of the case, and the prejudice to this respondent is obvious.

**14. Did the District Court err in instructing the jury as follows:**

> "But, $300 a month is the figure that you would take into consideration and the years and that have

been outlined, and the percentage of disability covering those years. I give you those figures without building up anything at all, but the matter of damages is for you, taking everything into consideration." (R., 155.)

Petitioner had testified that his monthly earnings immediately prior to the accident were around $285.00 or 300.00 a month. (R., 28.) Petitioner did not testify that is earnings amounted to an average of $300.00 per month. n spite of this, however, the court instructed the jury that 300.00 was the figure that they would take into considera-on. The court also instructed the jury that they should ake the figure of $300.00 a month into consideration for ne years outlined. By years outlined, the court was re-erring to the statement of counsel for petitioner that peti-oner had a life expectancy of 24.10 years. The court also nstructed the jury that they should take into considera-ion the percentage of disability for the years outlined at 300.00 a month. The percentage of disability obviously eferred to the forty to sixty per cent disability about hich Dr. Ridgeway and Dr. Claybourne had testified. The ourt failed to take into consideration Dr. Pickett's testi-nony that the injury to petitioner's eighth dorsal vertebra as a result of an injury which petitioner had sustained rior to June 22, 1948. The court in so instructing the ury submitted a formula for assessing damages, all com-onent parts of which were incorrect and in error.

**15. Did the District Court abuse its discretion in commenting on the evidence?**

The court erred and abused its discretion in commenting n the evidence and thereby committed error prejudicial o the rights of the defendant. In the case of Home Insur-nce Co. v. Consolidated Bus Lines, 179 F. 2d., 768, (Fourth

Cir.), decided January 28, 1950, the court held that it was reversible error to stress the evidence and theory of one party prominently and fully, and not call attention to the main points of the opposite party's case.

The court in the instant case overemphasized petitioner's theory of the case and stressed every claim of the petitioner. On the other hand, the court completely nullified every defense of the respondent. Petitioner offered no evidence of the negligence of the respondent but claimed that the res ipsa loquitur rule of evidence applied. The court overemphasized this rule, misstated it, and so confused the jury as to the purpose and intent of the rule that the respondent was in fact charged out of court.

The court gave the jury the impression that in a case involving res ipsa loquitur, it was not necessary to prove negligence by a preponderance of the evidence. (R., 133.)

The court in instructing the jury minimized petitioner's duty to exercise ordinary care. (R., 132.)

The court overemphasized elements of damage that were not issues in the case. The court said that the petitioner suffered **"some humiliation."** (R., 129, 140, 141.)

After the respondent objected to the charge regarding humiliation, the court said (R., 153.):

> **"Now, there is a question of humiliation here. The word was used. It happened because I was quoting from another charge.** I think that you understood the limitation I put upon humiliation, and that is the humiliation that comes when a young man, a comparatively young man, fifty, is unable to do a full day's work at his job. That is all. That is a humiliation. I don't think that there is any other humiliation, and personally, I don't think that's a great deal of humiliation, either." (Emphasis ours.)

The court overemphasized the extent of petitioner's disability and the measure of damages. (R., 129.)

**The court in instructing the jury completely nullified respondent's theory of the case.** Respondent in its defense offered proof of the violation of a safety rule. The court instructed the jury to disregard the rule. (R., 137.)

Respondent in its defense offered evidence that petitioner could have blocked the ash pan up with wooden blocks to keep it from falling. The court said (R., 137):

> "The defendant claims that he should have put some blocks underneath it, but there is not one bit of evidence by anybody that that is the way anybody ever did it. The evidence is that this is the way they did it."

After respondent objected to this charge, the court said to the jury (R., 154):

> "Now, the court said it couldn't see how this man could have performed his work in any other manner. If you jurors think he could, from the evidence as you know it, that is up to you, and you are not to be biased by what I think the facts show at all. You are the judges of the facts, not me."

Respondent in its defense offered evidence that petitioner was in exclusive control of the repair operation and that Jaynes, the helper, was performing his work under petitioner's supervision. The court said (R., 136):

> "Two men were working on this job, and there is no question but what the man up above was under the supervision of the plaintiff here, but I instruct you now that that does not make any difference because the assumption of risk is not a part of this case. He does not assume the risk of a fellow employee." (R., 138.)

Respondent offered evidence to prove that after the accident of June 22, 1948, petitioner worked until he was furloughed in April of 1949; and that after he was furloughed

he applied for and received unemployment compensation from the railroad retirement board from April, 1949 to February, 1950 and that he signed for said benefits weekly. (R., 43.)

During the trial the court informed the jury of the stipulation of counsel with regard to the unemployment benefits as follows (R., 25, 26):

> (Discussion between counsel and the court.)
> "The Court: There is a difference, ladies and gentlemen, except in this. Counsel are agreed that under the Federal Employer's Liability Act that you must, if you get unemployment compensation—what happens to it afterwards is something else—**you must assert that you are able and willing to work.**" (Emphasis ours.)

In spite of this, the court said to the jury (R., 140):

> "There is no evidence about this compensation except that he got it. There is no evidence of the conditions of it, or anything else."

Respondent in its answer plead the defense of contributory negligence. The court, in the presence of the jury, remarked as follows (R., 130):

> "I do not believe, gentlemen, that there is any reason to submit to the jury the question of comparative negligence. Does either side think that?
> Mr. Alexander: We would like to be heard on that.
> The Court: Do you want it, or don't you?
> Mr. Alexander: Yes.
> The Court: Have you prepared a request on that?
> Mr. Alexander: We haven't.
> The Court: I would like to find out if there is any possible evidence of comparative negligence in this case. Approach the bench, please."

The court, after a conference with counsel, then instructed the jury on the issue of comparative negligence.

However, the jury could not have helped but feel that the court was of the opinion that there was no contributory negligence on the part of the petitioner.

The overemphasis of the petitioner's case is obvious. The complete nullification of respondent's defense is likewise obvious. The court submitted the claims and theories of the petitioner prominently and fully, and instead of the court calling their attention to the main points of the respondent's case the court instructed the jury to disregard them. **It is interesting to note that counsel for petitioner did not make one specific objection to the charge of the court.**

## CONCLUSION.

Petitioner has requested the court consider the questions presented by him as well as all of the questions presented by the respondent on its appeal from the District Court to the Court of Appeals. An examination of the entire record in this case requires that the court affirm the judgment of the Court of Appeals for the Sixth Circuit and grant a new trial to the parties.

Respectfully submitted,

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MARCH 7, 1955.

*Decisions Per Curiam.*

No. 105. O'NEILL *v.* BALTIMORE & OHIO RAILROAD CO. Certiorari, 348 U. S. 812, to the United States Court of Appeals for the Sixth Circuit. Argued March 2, 1955. Decided March 7, 1955. *Per Curiam:* The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with instructions to reinstate its order dated July 30, 1952. *C. Richard Grieser* argued the cause and filed a brief for petitioner. *Robert F. Ebinger* argued the cause for respondent. With him on the brief were *E. H. Burgess, Kenneth H. Ekin* and *Arvin J. Alexander*. Reported below: 211 F. 2d 190.